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IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. TILTON, Acting Secretary of the California Department of Corrections and Rehabilitation, *Petitioner*,

v.

BRIAN A. BUCKLEY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Finding as a fact that the prisoner "well knew" his plea bargain called for a sentence of fifteen years to life imprisonment, the state court rejected his claim that the bargain called only for a maximum sentence of fifteen years instead. Without disturbing the state court's factual finding, the Ninth Circuit Court of Appeals ordered habeas corpus relief on grounds that California contract law required the state court to ignore the prisoner's actual understanding of the bargain.

The Questions Presented are:

1. Did "clearly established federal law" require the California court to apply state contract law to the plea bargain claim?

2. If so, may the federal court order habeas corpus relief based on its own view that state contract law required the state court to ignore the prisoner's understanding of the bargain?

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No.

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v.

BRIAN A. BUCKLEY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

James E. Tilton, Acting Secretary of the California Department of Corrections and Rehabilitation (the State), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1/]

OPINIONS BELOW

The en banc opinion of the Ninth Circuit affirming the district court's judgment is reported as *Buckley* v. *Terhune*, 441 F.3d 688 (9th Cir. 2006). (App. A1-A21.) The Ninth Circuit's order granting respondent's petition for rehearing en banc is reported at 418 F.3d 1003 (9th Cir. 2005). (App. B1.) The original three-judge panel opinion of the Ninth Circuit reversing the district court's judgment is reported as *Buckley* v. *Terhune*, 397

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1. In the proceedings below, C.A. Terhune was named as respondent's custodian. James E. Tilton is now the Acting Secretary of the California Department of Corrections and Rehabilitation, and is the appropriate custodian for the purposes of these proceedings.

F.3d 1149 (9th Cir. 2005), reversed and superseded on rehearing en banc, 441 F.3d 668 (9th Cir. 2006). (App. C1-C34.) The order and opinion of the United States District Court for the Central District of California granting respondent habeas corpus relief is reported as *Buckley* v. *Terhune*, 266 F.Supp.2d 1124, 1141 (C.D. Cal. 2002), superseded on rehearing en banc, 441 F.3d 668 (9th Cir. 2006). (App. D1-D38.)

The California Supreme Court's order summarily denying habeas corpus relief is unreported. (App. F1.) The California Court of Appeal's order summarily denying habeas corpus relief is unreported. (App. G1.) The Ventura County Superior Court's opinion denying habeas corpus relief and finding that respondent "well knew" that the terms of his plea agreement called for an indeterminate sentence of fifteen years to life is unreported. (App. H1-H3.)

All of these opinions and orders are reproduced in the Appendix to this Petition.

JURISDICTION

The published en banc opinion of the Ninth Circuit affirming the judgment of the district court was filed and entered on March 17, 2006. (App. A1-A21.) This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

States; or [(2)] resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. [¶] (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that – [¶] (A) the claim relies on – [¶] (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or [¶] (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and [¶] (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

The Crime

In 1986, respondent Brian Buckley and Curtis Fauber armed themselves with guns and entered the residence of Thomas Urell during the night. Fauber bound Urell with duct tape while respondent held him at gunpoint. Fauber then bludgeoned Urell to death with the blunt end of an axe he found in Urell's residence. Fauber and respondent took various items from Urell's residence, including a safe and Urell's vehicle.

The State Court Proceedings

Respondent and Fauber were arrested and separately charged for Urell's murder in Ventura County, California. Deputy District Attorney Donald Glynn was assigned to prosecute both cases. Mr. Glynn offered respondent a plea agreement via letter, providing that respondent would plead guilty to second-degree murder in exchange for his truthful testimony against Fauber at trial and for his testimony against Christopher Caldwell, who had committed an unrelated prior murder with Fauber.[2/] The letter was silent with respect to respondent's sentence, but California law provided for nothing other than an indeterminate term of fifteen years to life for second-degree murder at the time. (App. O1-O4, P1-P3.)

Mr. Glynn provided respondent's trial counsel, Willard Wiksell, with a Felony Disposition Statement for respondent to sign and initial. At one place the document provided, in preprinted type, "I could be sentenced to the state prison for a maximum possible term of ___ years." Mr. Glynn wrote "15" into the blank space, and respondent initialed this paragraph. In another place on the document, under a preprinted heading entitled "The District Attorney's Position on Sentence," Mr. Glynn wrote, "[a]t the time of sentencing, the People will move the Court to declare the murder to be murder in the second degree, with a maximum term of 15 years to life." Respondent did not initial this paragraph. Respondent signed the People's offer letter and the Felony Disposition Statement on December 17, 1987. Mr. Wiksell also signed the People's offer letter and the Felony Disposition Statement, which included a paragraph

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2. The en banc opinion of the Ninth Circuit erroneously states that "[t]he charges arose from allegations that Buckley and two others, Curtis Fauber and Christopher Caldwell, robbed and killed Thomas Urell in his home in July of 1986," and later refers to "Caldwell's participation in the Urell murder." (App. A3.) It is undisputed that Caldwell was not a party to the Urell murder, but was involved in a separate murder with Fauber that predated the Urell offense.

indicating that he had "explained the direct and indirect consequences of this plea to the defendant and am satisfied he understands them." (App. N1-N9.)

At a January 4, 1988, change of plea hearing, Mr. Glynn asked respondent during the plea colloquy, "Do you understand that for second degree murder you could be sentenced to state prison for a maximum possible term of 15 years?" Respondent answered, "Yes." Mr. Glynn subsequently asked respondent during the plea colloquy, "at the time of sentencing the People will ask the Court to declare the murder to be murder in the second degree with a maximum term of 15 years to life . . . Do you understand that to be the situation?" Respondent answered, "Yes." After accepting the plea, the trial court asked defense counsel whether respondent wished to be sentenced by the same judge who took the plea. Defense counsel responded that it did not matter, "because it's second degree murder and you can only sentence him to 15 to life." (App. M1-M10.)

Three days later, on January 7, 1988, respondent testified in the guilt phase of the Fauber case, and stated that his plea agreement called for a sentence of "15 years to life." (App. J4-J6.) Respondent subsequently testified at Caldwell's preliminary hearing, and at the penalty phase of the Fauber trial. During the penalty phase of the Fauber trial, respondent was asked on cross-examination when he expected to be released or paroled from prison. Respondent stated that he expected to be released on parole from prison in seven and a half years. (App. L1-L2.)

Thereafter, the trial court sentenced respondent under his plea agreement to an indeterminate term of fifteen years to life. Respondent did not object to the sentence imposed by the trial court. (App. K1-K6.)

On May 13, 1996, respondent filed a habeas petition in the Ventura County Superior Court, through counsel, alleging that his plea agreement required that he serve no more than a determinate term of fifteen years. Respondent presented the superior court with his own declaration, the written plea

agreement, and the reporter's transcript from his plea and sentencing hearings. The superior court ordered the district attorney to file a return. The district attorney filed a return that included a declaration of Mr. Glynn denying that the People had ever offered respondent anything other than an indeterminate term of fifteen years to life under the plea agreement. The superior court then directed respondent to file a traverse, and told respondent that it was specifically concerned with his testimony during the guilt phase of the Fauber trial in which he stated that he was to receive a term of fifteen years to life. Respondent filed a traverse, but presented no additional evidence in superior court and did not address the superior court's concerns regarding respondent's testimony during the Fauber hearing. The superior court denied habeas relief in a written opinion, finding that "the advisement was that the sentence would be 15 years to life as provided by law, and that the [respondent] well knew this." (App. H1-H3, I1, J1-J6.)

Respondent subsequently filed a habeas petition in the California Court of Appeal raising the same claim he raised in the superior court, which was denied without comment. Respondent then filed a habeas petition in the California Supreme Court raising the same claim he raised in the superior court, which was denied without comment. (App. F1, G1.)

The Federal Habeas Corpus Proceedings

Respondent filed a federal habeas corpus petition in United States District Court. After the State filed its return and respondent filed his traverse, the district court issued an order requiring an evidentiary hearing regarding "what [respondent] was told" about the sentence he was to receive. The district court directed the parties to present the testimony of respondent's trial counsel, Mr. Wiksell, during the hearing.

During the federal evidentiary hearing, respondent testified in his own behalf, and presented the testimony of his mother and Larry Troxel, a Ventura County District Attorney's Office

Investigator, who worked with Mr. Glynn on the prosecutions related to the Urell murder. Mr. Troxel testified that it was his recollection that respondent was to receive a determinate fifteen year term. The State called Mr. Wiksell and Mr. Glynn, who each testified that respondent was never promised anything other than an indeterminate term of fifteen years to life. Mr. Wiksell testified that he had informed respondent that the plea agreement called for an indeterminate term of fifteen years to life. (App. E1.)

The federal magistrate recommended habeas relief, and the district court adopted the recommendation over the State's written objections. (App. D1-D38.) The Magistrate Judge's report asserted: "the Superior Court's findings and conclusion rest on a flawed foundation. It lacked the benefit of an evidentiary hearing during which it could have developed the record regarding any discussions or advice which occurred off the record." (App. D32-D33.) The district court's order granting habeas relief directed the State to release respondent from custody at the expiration of a fifteen year term (App. D1.) The district court subsequently denied the State's motion to stay the judgement pending appeal, as did the Ninth Circuit. Respondent was released from state prison in January 2003 and has been on parole since that time.

The Ninth Circuit Court of Appeals reversed the district court in a 2-1 decision. In an opinion by Judge Trott, joined by Judge Rawlinson, the panel held that the district court erred in holding an evidentiary hearing and in basing its determination on evidence presented for the first time in federal court rather than on the evidence presented to the state courts. The panel concluded that the Ventura County Superior Court reasonably rejected respondent's claim, and that the evidence presented in federal court did not establish, by clear and convincing evidence, that the state court's factual findings were incorrect or that its corresponding factual determinations were objectively unreasonable. (App. C1-C22.) The panel majority concluded that the construction of a plea agreement is a matter of state law,

not to be reinterpreted by federal courts, citing this Court's opinion in *Ricketts* v. *Adamson*, 483 U.S. 1, 5 n.3. (1987). (App. C22-C23.) Judge Bea dissented from the majority opinion, stating that the state court had failed to apply the law of contracts in ruling on respondent's claim. (App. C23-C34.)

Respondent filed a petition for rehearing and request for rehearing en banc, adopting the rationale of Judge Bea in dissent. The Ninth Circuit granted rehearing en banc.[3/] (App. B1.)

On March 17, 2006, the en banc court issued an opinion written by Judge Reinhardt. The majority read *Ricketts* to mean just the opposite of what the panel had found it to mean. According to the en banc court, *Ricketts* held as a matter of clearly established federal law under 28 U.S.C. § 2254(d)(1) that plea agreements must be construed according to state law. (App. A9-A10.) California plea agreements, in the en banc court's view, must be construed according to state contract law principles. Finding that California courts had not explicitly applied state contract law principles to respondent's claim, the en banc court concluded that the state courts' resolution of respondent's claim was contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1). (App. A12.) The federal court then set forth its own version of state contract law principles and applied that interpretation to respondent's plea agreement with no regard for the state court's factual finding that respondent "well knew" the plea agreement required an indeterminate term of fifteen years to life. The majority concluded that under state law respondent's plea agreement must be deemed a bargain for a determinate term of fifteen years, and that it had been breached by the imposition of an

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3. Following oral argument on rehearing en banc, the Ninth Circuit issued an order directing the parties to "attempt to settle this matter through the court's mediation unit." The State filed a motion for reconsideration of the order directing the parties to meditation. The Ninth Circuit subsequently rescinded its order directing the parties to mediation and deemed the matter submitted.

indeterminate term of fifteen years to life, and that respondent was entitled to specific performance of that agreement. (App. A12-A17.)

Judge Callahan issued a dissenting opinion, joined by Judge Tallman, arguing that, although the majority claimed it was granting relief under 28 U.S.C. § 2254(d)(1), it was actually granting it under § 2254(d)(2) without deference to the state court's factual findings, and that the majority had improperly substituted its own factual determinations for the reasonable determinations of the state court. (App. A17-A22.)

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because, in granting habeas corpus relief, the Ninth Circuit opinion conflicts with this Court's decisions in *Ricketts v. Adamson*, 483 U.S. 1, and *Estelle* v. *McGuire*, 502 U.S. 62 (1991), and fails to adhere to the deferential review standard of 28 U.S.C. § 2254(d). First, the Ninth Circuit determined that the California state courts were required by clearly established Federal law to apply commercial contract law principles to resolve respondent's claim that his plea agreement had been violated. The proper application of that state law, according to the en banc court, meant that the state court was required by the federal Constitution to blind itself to the basic reality of what respondent himself believed his bargain to be, and to confine its review to an abstract consideration of the paper record, as if it were construing a commercial contract. There is no such clearly established federal law. Indeed, this Court previously warned the Ninth Circuit in another case involving the same issue that federal courts have no "license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation." *Ricketts*, 483 U.S. at 5 n.3. The Ninth Circuit en banc court paid no heed to this warning, and did just that.

Second, the en banc court used its mistaken view of clearly established law to nullify one of the most basic of all limitations

on federal habeas courts, the principle that a federal court sitting in habeas jurisdiction may not grant a prisoner relief on the basis of a perceived state law error. *Estelle* v. *McGuire*, 502 U.S. at 68. These two errors show that the Ninth Circuit has once again lost sight of the most elementary constraints on federal habeas corpus power. This Court should grant certiorari to rectify both errors.

I. "CLEARLY ESTABLISHED FEDERAL LAW" DID NOT REQUIRE THE CALIFORNIA COURTS TO APPLY STATE CONTRACT LAW PRINCIPLES TO CONSTRUE THE TERMS OF THE PLEA AGREEMENT WITHOUT REGARD TO WHETHER RESPONDENT'S PLEA WAS KNOWING, VOLUNTARY, AND INTELLIGENT

Respondent first raised his claim that his plea agreement required a determinate term of fifteen years, rather than an indeterminate term of fifteen years to life, in the Ventura County Superior Court in a state habeas corpus proceeding. The superior court conducted an extensive hearing on a written record and concluded that respondent "well knew" that the plea agreement required him to serve an indeterminate term of fifteen years to life at the time he entered his plea. (App. H1-H3, I1.) The Ventura County Superior Court's factual findings are entitled to the deference mandated by 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

The Ninth Circuit Court of Appeals, however, ignored the state court's factual determinations, and instead held that the California courts, as a matter of "clearly established federal law" under § 2254(d)(1), had a duty to construe respondent's plea agreement according to state contract law principles. Concluding that the state court had failed to do so, the Ninth Circuit reinterpreted the plea agreement under its own flawed version of state law, without regard to the state court's factual findings about respondent's actual understandings of the plea. Having eliminated the state courts' essential finding that respondent "well knew" that he had entered into an agreement

for fifteen years to life, not just for fifteen years, the en banc court concluded that respondent was entitled to habeas relief. In so doing, the Ninth Circuit overstepped its authority.

The Ninth Circuit located the source of the "clearly established Federal law" requiring California to employ its own contract law in a single phrase wrenched out of context from a passage in *Ricketts*. (App. A2-A3, A9-A10.) But *Ricketts* says no such thing, and this Court has never held that a state must apply contract law principles to interpret plea agreements. The leading case on the issue of a breach of a plea agreement is *Santobello* v. *New York*, 404 U.S 257, 261 (1971). *Santobello* discusses the consequences of a broken plea agreement, but it does not prescribe the mode of analysis a state must follow to determine whether the agreement was broken. Neither does *Ricketts*. The Ninth Circuit has substituted a review of the process used by the state court for a review of the result reached in the state court. This is a fundamental error.

The question for a federal habeas court reviewing a claim of a breach of a plea agreement is not whether or how well a state court applied its own law in determining what the agreement was and whether the agreement was broken. The question is whether the result reached in the state court was an objectively unreasonable application of controlling federal law. The controlling constitutional law on this issue is that a defendant has a due process right to enter a plea in a "knowing," "voluntary and intelligent" manner. See *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984); *Santobello* v. *New York*, 404 U.S. at 261. The first step in answering that question is to ascertain what the bargain entailed, and answering that question frequently disposes of the claim. That is precisely the question the state court considered and answered when it found as a matter of fact that respondent "well knew" that the bargain he had made was his plea of guilty in exchange for a sentence of fifteen years to life. But that factor was deemed irrelevant in the Ninth Circuit's opinion. The correct constitutional standard is not mentioned, or referred

to, or relied upon in the opinion. Instead, the majority concluded, based on *Santobello* and *Ricketts*, that state courts must determine the components of plea agreements according to a particular set of state law rules, and that federal courts sitting in habeas jurisdiction may reinterpret and reapply those state law rules to determine whether a breach of a plea agreement has occurred. (App. A9-A17.)

The majority opinion does not hold that respondent's plea was not knowingly and voluntarily entered, or that the California courts erred in reaching such a conclusion, and does not dispute the Ventura County Superior Court's conclusion that respondent "well knew" the terms of his plea agreement required an indeterminate term of fifteen years to life. (App. H1-H3, I1.) As demonstrated in both the original panel opinion and dissent, and in the en banc dissent, the state court's factual finding that respondent "well knew" that he had bargained for a sentence of fifteen years to life is virtually invulnerable. Instead, the majority opinion found constitutional error predicated on nothing more than its own view of how state "contract law" should apply to an analysis of respondent's claim.

The state court determination that respondent subjectively understood his plea agreement to require an indeterminate term of fifteen years to life was consistent with this Court's articulation of what due process requires of a plea agreement, namely, that the agreement be entered into in a knowing, voluntary, and intelligent manner. See *Brady* v. *United States*, 397 U.S. at 748; *Mabry* v. *Johnson*, 467 U.S. at 509; *Santobello* v. *New York*, 404 U.S. at 261. The Ninth Circuit majority simply subtracted the component of respondent's subjective understanding from its analysis, noting off-handedly that "whether or not the state court's determination of [respondent's] state of mind was reasonable is wholly irrelevant." (App. A12.) The state courts understood that in resolving respondent's constitutional claim, his own understanding of the terms of his bargain was not irrelevant. It was essential. Even more

important, this Court has never suggested that a prisoner's understanding of his plea bargain is "wholly irrelevant."

In place of a review with a properly limited focus, the en banc court misconstrued *Santobello* and *Ricketts* to the point of distortion, substituting instead a discourse on the proper elements of California state contract law followed by a lecture explaining to the California courts how they had misunderstood and misapplied their own law. In so doing, the Ninth Circuit majority simply ignored this Court's unambiguous command in *Ricketts*, an earlier Ninth Circuit case, that federal courts have no "license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation." *Ricketts*, 483 U.S. at 5 n.3. At the same time, the Ninth Circuit majority flouted the requirements of § 2254(d)(1).

In *Ricketts*, the defendant pled guilty to second-degree murder in a plea agreement that called for him to testify against two codefendants involved in the murder. The defendant testified against his codefendants and was sentenced to twenty years in state prison pursuant to the agreement. The Arizona Supreme Court subsequently reversed the codefendants' convictions on appeal. The state sought the defendant's testimony at the retrial of his codefendants and he refused. The state then informed the defendant that he was in breach of the plea agreement and filed an information charging him with first degree murder. The Arizona Supreme Court denied the defendant's claim of a double jeopardy violation and concluded that the defendant had violated the terms of his plea agreement by refusing to testify at the retrial. The Ninth Circuit, however, granted defendant habeas corpus relief. *Ricketts* v. *Adamson*, 483 U.S. at 4-6.

This Court reversed the Ninth Circuit, and held:

> We will not second-guess the Arizona Supreme Court's construction of the language of the plea agreement. While we assess independently the plea agreement's effect on respondent's double jeopardy rights, the construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of

> reasonableness, matters of state law, and we will not disturb the Arizona Supreme Court's reasonable disposition of those issues. The dissent's discourse on the law of contracts is thus illuminating but irrelevant. The questions whether the plea agreement obligated the respondent to testify at the retrial of [his codefendants] and, if so, whether respondent breached this duty are matters appropriately left to the state courts. The dissent acknowledges that "deference to the Arizona Supreme Court's construction is appropriate," [citation], but proceeds to engage in plenary review of that court's holding that the respondent breached the agreement. The dissent does not explain the nature of the deference it purports to afford the state courts, and one is unable to detect any such deference in the approach the dissent advocates. And, the dissent misconstrues the interrelationship between the construction of the terms of the plea agreement and the respondent's assertion of a double jeopardy defense. As noted previously, once a state court has, within broad bounds of reasonableness, determined that a breach of a plea agreement results in certain consequences, a federal habeas court must independently assess the effect of those consequences on federal constitutional rights. This independent assessment, however, proceeds without second guessing the finding of a breach and is not a license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation.

Ricketts v. *Adamson*, 483 U.S. at 5 n.3.

This Court's comments in *Ricketts* regarding the interpretation of plea agreements were based, in part, on a portion of the dissent authored by Justice Brennan, in which he argued that the defendant's actions under the plea agreements needed to be construed prior to determining whether his double jeopardy rights were violated. *Ricketts*, 483 U.S. at 13-14. Justice Brennan opined:

> This Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements. Nevertheless, it seems clear that the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate. [Citations.] It is also clear, however, that commercial contract law can do no more than this, because plea agreements are constitutional contracts. The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the state.

Id. at 16.

Nothing in this Court's opinion in *Ricketts*, or the dissent of Justice Brennan for that matter, substantiates the Ninth Circuit's conclusion in the instant case that as a matter of "clearly established federal law" under section 2254(d)(1), a state court must construe a plea agreement according to a particular set of state-law principles identified by the federal court, nor may a federal court reinterpret a state court's reasonable construction of a plea agreement to determine whether a breach has occurred, rather than confining itself to the relevant constitutional determination of whether a plea was entered in a knowing, voluntary, or intelligent manner. Similarly, nothing in *Santobello* purports to require any particular method for a state court to utilize in determining whether a plea agreement was entered knowingly and voluntarily. *Santobello* v. *New York*, 404 U.S. at 259-67; see *Smith* v. *Stegall*, 385 F.3d 993, 999 (6th Cir. 2004).

At least two circuits have rejected the notion that this Court has ever clearly articulated a procedure by which state courts must determine the existence of a breach in a state case. *Smith*

v. *Stegall*, 385 F.3d at 999; *Innes* v. *Dalsheim*, 864 F.2d 974, 978 (2nd Cir. 1988). In *Smith*, the Sixth Circuit concluded that, "Although *Santobello* discusses the consequences of a broken plea agreement, the case does not amplify the parameters of what constitutes a breach." *Smith*, 385 F. 3d at 999. In *Innes*, the Second Circuit stated that *Santobello* requires a state court to determine "precisely what was provided" in a plea agreement, but does not suggest a particular method for this determination other than demanding that a defendant enter his plea in a knowing, voluntary, and intelligent manner. *Innes*, 864 F. 2d at 978-79.

In the instant case, unlike *Santobello*, the state court was concerned with determining the elements of the plea agreement, rather then the consequences of an undisputed breach. *Santobello* v. *New York*, 404 U.S. at 259-67. The Ventura County Superior Court was charged with construing the plea agreement to determine what prison term respondent had agreed to as part of his plea. The superior court construed the terms of the agreement to require an indeterminate term of fifteen years to life, and found that respondent "well knew" that this prison term was required of him when he entered the agreement. (App. H1-H3.) The California courts' undisturbed determination that respondent "well knew" that his plea agreement required an indeterminate term of fifteen years to life at the time he entered his plea satisfies the clearly established precedent of this Court requiring that a plea agreement be entered in a knowing, voluntary, and intelligent manner. The denial of respondent's claim was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. *See Brady* v. *United States*, 397 U.S. at 748; *Mabry* v. *Johnson*, 467 U.S. at 509; *Santobello* v. *New York*, 404 U.S at 261.

II. IN REVIEWING A DUE PROCESS CLAIM RELATING TO A STATE PLEA PROCEEDING, A FEDERAL HABEAS COURT HAS NO POWER TO REINTERPRET STATE LAW TO REQUIRE THE STATE COURT TO IGNORE THE PRISONER'S OWN UNDERSTANDING OF THE TERM REQUIRED BY THE PLEA BARGAIN

Even if the Constitution required California courts to employ state contract-law principles to evaluate negotiated pleas, the Ninth Circuit had no power to tell California courts what those principles are, let alone to conduct an analysis of respondent's claim using its own mistaken version of those principles. A state's decision to construe its plea agreements in a particular method under state law does not provide a federal court sitting in habeas jurisdiction with the authority to reinterpret that agreement under state law to grant a prisoner relief, because a federal court sitting in habeas jurisdiction may not grant relief on the basis of a perceived state law error. *Estelle* v. *McGuire*, 502 U.S. at 68. By granting itself permission to give California courts a brief tutorial on California law, disguised as a review for constitutional error, the Ninth Circuit has contravened the most basic principles of comity and federalism so clearly expressed in *Estelle* v. *McGuire*.

These principles are reiterated in *Ricketts*, but they were simply ignored by the en banc court by means of its highly selective quotation from footnote 3 of that opinion. (App. A9.) The effect of the en banc court's ellipsis is best demonstrated by quoting the *Ricketts* passage more completely, highlighting the single phrase the court of appeals plucked out of context:

> We will not second-guess the Arizona Supreme Court's construction of the language of the plea agreement. While we assess independently the plea agreement's effect on respondent's double jeopardy rights, ***the construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law***, and we will not disturb the Arizona Supreme Court's reasonable disposition of those issues. . . . As noted previously, once

> a state court has, within broad bounds of reasonableness, determined that a breach of a plea agreement results in certain consequences, a federal habeas court must independently assess the effect of those consequences on federal constitutional rights. This independent assessment, however, proceeds without second guessing the finding of a breach and is not a license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation.

Ricketts v. *Adamson*, 483 U.S. at 5 n.3. Thus, this Court's opinion in *Ricketts* echoes the *Estelle v. Maguire* restriction on federal habeas power, making clear that a state court's reasonable interpretation of its own plea agreements may not be disturbed by a federal court on habeas corpus. *Ricketts* v. *Adamson*, 483 U.S. at 5 n.3.

But even if it were assumed further that 28 U.S.C. § 2254(d)(1), by way of *Ricketts*, allows a federal court on habeas corpus to reassess the reasonableness of a state court's determination of a plea agreement under state law, respondent still would not be entitled to habeas relief because the Ventura County Superior Court's interpretation of this plea agreement was eminently reasonable. Indeed, nothing in the en banc court's opinion even suggests otherwise.

Here, the superior court carefully reviewed an abundance of evidence in the extensive written evidentiary record and argument submitted by both sides, including the written plea agreement, the reporter's transcript of the plea and sentencing hearings, and declarations of the parties, including the prosecutor, who averred that he never offered respondent anything other than an indeterminate term of fifteen years to life. The court also considered respondent's own testimony during the guilt phase of the Fauber trial, given three days after his plea, that he understood his plea agreement to require a sentence of fifteen years to life, and took into account the crucial factor that at the time of the plea, fifteen years to life was the only lawful sentence. Based on its scrupulous review of this

evidence, the superior court reasonably concluded that respondent "well knew" that the terms of his plea agreement required an indeterminate term of fifteen years to life. (App. H1-H3, I1.)

In any event, the superior court's act of looking to "extrinsic evidence" to resolve an ambiguity in the agreement was entirely proper and reasonable under California state law, as respondent's subsequent conduct in testifying that he understood his plea agreement to require a prison term of fifteen years to life helped resolve any ambiguity attending to the agreement.[4] See *People* v. *Shelton*, 37 Cal. 4th 759, 767, 37 Cal. Rptr. 3d 354 (2006) (subsequent conduct of the parties is relevant to construing ambiguous terms of a plea agreement); *Morey* v. *Vannucci*, 64 Cal. App. 4th 904, 912, 75 Cal. Rptr. 573 (1998). At the most basic level, nothing in California contract law requires a court construing a plea agreement to ignore a defendant's understanding of the bargain, as the Ninth Circuit opinion would require. The Ninth Circuit's contrary conclusion was both improper on federal habeas corpus under *Estelle* v. *McGuire*, 502 U.S. at 68, and erroneous under state law under *People* v. *Shelton*, 37 Cal. 4th at 767.

Where, as in the instant case, a term of a plea agreement is rendered ambiguous by competing provisions, a court under California contract law objectively looks to extrinsic evidence to determine the parties' reasonable understanding of the term's meaning. The examination of extrinsic evidence under California law includes looking to the subsequent conduct of the parties. It is only if the extrinsic evidence regarding the parties' intent fails to resolve the term's ambiguity must the court apply

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4. Respondent's subsequent testimony during the penalty phase of the Fauber trial that he expected to be released from state prison in seven and a half years was wholly consistent with a reasonable expectation of parole eligibility for a defendant convicted of second-degree murder serving an indeterminate term of fifteen years to life under California law at the time of respondent's testimony. See *In re Oluwa*, 207 Cal. App. 3d 439, 255 Cal. Rptr. 35 (1989).

the rule construing ambiguous terms against the drafting party. See *People* v. *Shelton*, 37 Cal.4th at 767; *People* v. *Toscano*, 124 Cal. App. 4th 340, 345, 20 Cal. Rptr. 3d 923 (2004); *Vine* v. *Bear Valley Ski Company*, 118 Cal. App. 4th 577, 590 n.2, 13 Cal. Rptr. 3d 370 (2004).

A plethora of errors in the Ninth Circuit's majority opinion, both factual and legal, demonstrate that court's "readiness to attribute error" which is "inconsistent with the presumption that state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002). The Ninth Circuit's majority opinion in the instant case is contrary to the requirements of 2254(d)(1), and is directly at odds with this Court's prior opinion in *Ricketts*. It undermines the right and the duty of individual states to construe their own plea agreements in a manner consistent with the federal constitutional requirement that pleas must be entered in a knowing and intelligent manner. In so doing, the Ninth Circuit's opinion in this matter contravenes the principles of comity, federalism, and the primacy of state court determinations which the AEDPA was intended to promote. See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003).

CONCLUSION

For the stated reasons, petitioner respectfully asks this Court to grant the petition for writ of certiorari.

Dated: June 15, 2006

Respectfully submitted,

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN A. BUCKLEY, *Petitioner-Appellee*, v. C.A. TERHUNE, Director of the California Department of Corrections, *Respondent-Appellant.*	No. 03-55045 D.C. No. CV-00-02435-JSL OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
September 27, 2005—San Francisco, California

Filed March 17, 2006

Before: Mary M. Schroeder, Chief Judge, Stephen Reinhardt,
Alex Kozinski, M. Margaret McKeown,
Kim McLane Wardlaw, Raymond C. Fisher,
Richard A. Paez, Marsha S. Berzon, Richard C. Tallman,
Jay S. Bybee, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Callahan

COUNSEL

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OPINION

REINHARDT, Circuit Judge:

The law regarding plea agreements entered into in state court is well-established. They must be construed in accordance with state law. In California, plea agreements are construed in the same manner as all other contracts. In this case, however, the California courts failed to do so and, as a result, Brian Buckley might have remained in prison for life instead of for the fifteen years for which he bargained. We are required to ensure that his constitutional rights are not so violated, and that the bargain he entered into with the state is honored.

The state appeals the district court's order granting Buckley's petition for a writ of habeas corpus and directing that he be released from prison because he had already served the full fifteen years. The district court ruled that the state court's finding that Buckley "well knew" that his sentence for second degree murder was fifteen years to life was both contrary to clearly established federal law in violation of 28 U.S.C. § 2254(d)(1) and an unreasonable determination of the facts in violation of § 2254(d)(2). In accordance with the district court's order, Buckley has now been released. We affirm the judgment of the district court because, under § 2254(d)(1), the state court's failure to interpret Buckley's plea agreement according to California contract law resulted in a decision that was

contrary to clearly established Supreme Court law as set forth in *Santobello v. New York*, 404 U.S. 257 (1971), and *Ricketts v. Adamson*, 483 U.S. 1 (1987).

FACTUAL AND PROCEDURAL BACKGROUND

On November 12, 1987, Buckley was charged with burglary, robbery and first degree murder in Ventura County Superior Court. The charges arose from allegations that Buckley and two others, Curtis Fauber and Christopher Caldwell, robbed and killed Thomas Urell in his home in July 1986.

On December 15, 1987, Donald Glynn, the deputy district attorney assigned to Buckley's case, sent Buckley's attorney a letter offering a plea bargain. The letter stated that, in exchange for Buckley's sworn testimony describing Fauber and Caldwell's participation in the Urell murder and in two additional unrelated murders, Glynn would dismiss the robbery and burglary charges against Buckley and move the court to declare the murder charge against him to be murder in the second degree. The letter was silent as to the sentence Buckley would receive. Glynn attached to the letter a typewritten felony disposition statement. That document contained the following relevant language:

> *CONSEQUENCES OF PLEA* (Defendant to initial)
>
> My attorney has explained to me the direct and indirect consequences of this plea including the maximum possible sentence. I understand that the following consequences could result from my plea:
>
> I could be sentenced to the state prison for *a maximum possible term of 15 year(s).*
>
> ***
>
> After I have served my prison term, I may be subject to a maximum parole period of LIFE (*In re Carabes*, 144 Cal. App. 3d 927).[1/]

---

1. The number "15" was handwritten. The word "LIFE" was not

(Emphasis added). On December 17, 1987, Buckley initialed the paragraphs describing his agreed-upon sentence and signed the statement.

The district court found that at the time Buckley initialed and signed the felony disposition statement, a separate section of that document entitled "The District Attorney's Position on Sentence" was blank. At some point after December 17, 1987, but before the change of plea hearing on January 4, 1988, Glynn added a handwritten paragraph to that section: "At the time of sentencing the people will move the court to declare the murder to be murder in the second degree, *with a maximum term of 15 years to life*." (Emphasis added). Buckley did not initial the paragraph, and there is no evidence that he saw it before sentencing.

At the change of plea hearing, Glynn and Buckley engaged in the following colloquy:

> Q: And has your attorney explained all of the consequences of your plea to this charge?
>
> A: Yes.
>
> Q: Do you understand that for second degree murder you could be sentenced to state prison for *a maximum possible term of fifteen years?*
>
> A: Yes.
>
> Q: And do you understand that after serving a prison term you'll be subject to a parole period — I'm sorry, your Honor, does the Court know the parole period for second degree murder? I didn't enter that in the document.
>
> The Court: Yes, it's — the possibility is parole for life.
>
> Q: All right. I've entered this into the document. You could be subject to a parole period of life. And you could

---

added until the January 4, 1988, plea hearing. However, the question of Buckley's parole term is not at issue here.

also be ordered to pay a fine of not less than a hundred dollars nor more than $10,000. Do you understand that?

A: Yes.

***

Q: Now as I stated before and it's also contained in this Felony Disposition form, that at the time of sentencing the people will ask the Court to declare the murder to be murder in the second degree *with a maximum term of fifteen years to life.* And the People's reason for entering into that agreement are [sic] contained in this document that's attached to the Felony Disposition Statement.

I'd like to go into the terms of this agreement with you. In order — or as your part of the agreement you will agree to cooperate in the trials against Curtis Fauber and Christopher Cogwell [sic], and that you will testify in the Fauber case at all proceedings regarding the murder of Thomas Urell, David Church and Jack Dowdy, and testify truthfully regarding whatever you know about those murders. Do you understand that to be the situation?

A: Yes.

***

Q: I'm showing you the Felony Disposition form, this yellow form here, that has some initials B.B. against a number of the paragraphs. Also has the initials D.C.G. which are my initials against some of the paragraphs. And at the end of the form I see the date December 17, 1987 and your signature. Did you sign this document on that date?

A: Yes.

Q: And did you sign this document because *you read each of the paragraphs that you have initialed and you understand what's contained in these paragraphs*?

A: Yes.

(Emphasis added). The December 15 letter and the felony disposition statement were entered into evidence as constituting the plea agreement, and the court accepted and entered Buckley's guilty plea.

On January 7, 1988, Buckley testified on behalf of the prosecution at the guilt phase of Fauber's trial. On cross-examination, Buckley stated that he had been given a sentence of "fifteen years to life" in exchange for his testimony. On January 22, 1988, Buckley testified for the prosecution at a preliminary hearing in Caldwell's case. There, he acknowledged that his charged offense had been reduced to second degree murder, although there was no discussion of his sentence. On February 9, 1988, Buckley testified at the penalty phase of Fauber's trial. On cross-examination, when asked by defense counsel when he "expect[ed] to be released from prison" as a result of his testimony, Buckley responded, "seven and a half years."[2]

Buckley's sentencing hearing took place on March 1, 1988, after his testimony in the Fauber and Caldwell cases. At the hearing, Glynn informed the court that Buckley had "complied with the terms of the negotiated disposition." The prosecutor moved the court to declare the murder charge against Buckley to be murder in the second degree, and to dismiss the remaining two counts. The court granted the motion, ordered Buckley to pay $10,000 in restitution, and sentenced him to a prison term of fifteen years to life and a parole term of life. Buckley's counsel did not object to the sentence.[3]

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2. Buckley's statement that he expected to be released from prison in seven and a half years apparently reflected his erroneous belief that under California law he would be released after he had served half of his sentence if he exhibited good behavior. *See* CAL. PENAL CODE § 3049.

3. Despite the sentence of fifteen years to life in prison, Buckley contends that he believed that the maximum prison sentence he faced was fifteen years. According to Buckley, this belief resulted from the explicit terms of the plea agreement he saw and initialed, the colloquy at the change of plea hearing (in which he answered "yes" to the prosecutor's question whether he signed the plea agreement because he read and understood *each of the paragraphs that he initialed*), and his understanding that "fifteen to

On May 13, 1996, approximately eight years after Buckley's sentencing, he filed a petition for a writ of habeas corpus in the Ventura County Superior Court. On September 10, 1996, the court, in a two-page order, denied Buckley's petition:

> The court finds that with the exception of one statement in the negotiated disposition statement . . . and a reference at the time of the taking of the plea on January 4, 1988, . . . the records demonstrate that the *advisement* was that the sentence would be 15 years to life as provided by law, and that the petitioner well knew this . . . . During the taking of the plea on January 4, 1988, [ ] petitioner was expressly *advised* that the maximum term of imprisonment was 15 years to life . . . . Any ambiguity concerning petitioner's understanding of the sentence he was to receive is put to rest by petitioner's own statement found in the transcript of January 7, 1988, during petitioner's testimony at the trial of Curtis Fauber that he understood his term of imprisonment would be 15 years to life . . . .
>
> ***
>
> Based upon the record provided by counsel in the within matter, it is evident that petitioner well knew that the term of imprisonment for which he was to be committed to prison for the crime of second degree murder was 15 years to life. *In re Mosher* [sic], (1993) 6 Cal. 4th 342, 354-355, citing *United States vs. Timmreck* (1979) 441 US 780, 784.

(Emphasis added). Buckley next filed a habeas petition in the California Court of Appeal, which issued a one-sentence summary denial. The California Supreme Court also issued a one-sentence summary denial of a separate successive petition on March 31, 1999.

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life" was simply another way of saying "fifteen years in prison followed by a parole term of life." There is no evidence that Buckley's trial counsel explained to him the difference between the two sentences. According to Buckley, he did not discover that his sentence was actually an indeterminate term of fifteen years to life until a 1995 administrative hearing in prison.

Buckley filed a petition for a writ of habeas corpus in district court on March 7, 2000.[4] The court referred the case to a magistrate judge, who ordered an evidentiary hearing. The magistrate judge issued a report that recommended granting the writ. He found that, under 28 U.S.C. § 2254(d)(2), Buckley had demonstrated by clear and convincing evidence that the state court's factual finding regarding Buckley's subjective understanding of his sentence was "incorrect and unreasonable." *Buckley v. Terhune*, 266 F. Supp. 2d 1124, 1141 (C.D. Cal. 2002). Based on this finding, the magistrate judge concluded that, under § 2254(d)(1), the trial court had failed to "fulfill petitioner's reasonable understanding of the plea agreement," which was contrary to clearly established federal law holding that the state must fulfill a promise that induces a guilty plea. *Id.* at 1142-43. The magistrate judge recommended specific performance of the plea agreement: a determinate sentence of fifteen years in prison. *Id.* at 1143. The district court adopted the magistrate judge's report and recommendation, *id.* at 1126, and the state appealed.

We affirm, although our analysis differs from the district court's in some respects.

STANDARD OF REVIEW

The district court's decision to grant a 28 U.S.C. § 2254 habeas petition is reviewed *de novo*. *See Leavitt v. Arave*, 383 F.3d 809, 815 (9th Cir. 2004) (per curiam). We may affirm on any ground supported by the record, even if it differs from the rationale used by the district court. *See Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004). We review findings of fact made by the district court for clear error. *See Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003).

Under the Antiterrorism and Effective Death Penalty Act

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4. The one-year statute of limitations applicable to Buckley's federal habeas petition was tolled from the time that he filed his initial state habeas petition to thirty days after the California Supreme Court denied his last petition. *Carey v. Saffold*, 536 U.S. 214, 221-23 (2002); *Nino v. Galaza*, 183 F.3d 1003, 1006-07 (9th Cir. 1999). Thus, his federal petition was timely, and the state does not contend otherwise.

(AEDPA), § 2254 habeas petitions "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim — (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003). Because Buckley filed his federal habeas petition after AEDPA's effective date, we review his petition under the AEDPA standard. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997).

ANALYSIS

[1] Under *Santobello v. New York*, 404 U.S. 257, 261-62 (1971), a criminal defendant has a due process right to enforce the terms of his plea agreement. *See also Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003) ("[The defendant's] due process rights conferred by the federal constitution allow [him] to enforce the terms of the plea agreement."). In March 1999, when the California Supreme Court summarily denied Buckley's petition for a writ of habeas corpus, it had been clearly established federal law for more than a decade that the construction and interpretation of state court plea agreements "and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law." *Ricketts v. Adamson*, 483 U.S. 1, 6 n.3 (1987). In California, "[a] negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles," *People v. Shelton*, 37 Cal. 4th 759, 767 (2006), and "according to the same rules as other contracts," *People v. Toscano*, 124 Cal. App. 4th 340, 344 (2004) (cited with approval in *Shelton* along with other California cases to same effect dating back to 1982). Thus, under *Adamson*, California courts are required to construe and interpret plea agreements in accordance with state contract law.

The analysis regarding the breach of Buckley's plea agreement and the remedy to which he is entitled is not new to

this court. We previously applied similar principles and rules of construction in *Brown*. In that case, on the basis of *Santobello* and *Adamson*, we held that the state court, in failing to properly apply California contract law when interpreting a plea agreement, had engaged in an objectively unreasonable application of clearly established federal law under § 2254(d)(1). *Brown*, 337 F.3d at 1160 n.2. Here the California Superior Court not only failed to apply state contract law properly but failed to apply it at all. Its decision, therefore, is unquestionably contrary to clearly established federal law.[5]

I

[2] In California, "[a]ll contracts, whether public or private, are to be interpreted by the same rules . . . ." CAL. CIV. CODE § 1635; *see also Shelton*, 37 Cal. 4th at 766-67; *Toscano*, 124 Cal. App. 4th at 344. A court must first look to the plain meaning of the agreement's language. CAL. CIV. CODE §§ 1638, 1644. If the language in the contract is ambiguous, "it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." CAL. CIV. CODE § 1649. The inquiry considers not the subjective belief of the promisor but, rather, the "objectively reasonable" expectation of the promisee. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1265 (1992); *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 802 n.9 (1998) ("Although the intent of the parties determines the meaning of the contract, the relevant intent is objective — that is, the objective intent as evidenced by the words of the instrument, not a party's subjective intent." (internal quotation marks and citation omitted)). Courts look to the "objective

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5. The "unreasonable application" provision of § 2254(d)(1) applies where "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). In this case, however, the state court's decision was "contrary to" clearly established law because it failed to apply contract law analysis at all: "[A] state court decision is contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases . . . ." *Andrade*, 538 U.S. at 73 (internal quotation marks omitted). Whether we classify this case as an "unreasonable application of" or a "contrary to" case is irrelevant, however; the result would be the same in either instance.

manifestations of the parties' intent . . . ." *Shelton*, 37 Cal. 4th at 767. If after this second inquiry the ambiguity remains, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." CAL. CIV. CODE § 1654; *see also Toscano*, 124 Cal. App. 4th at 345 ("ambiguities [in a plea agreement] are construed in favor of the defendant").

[3] Our first inquiry here is whether the Ventura County Superior Court, in the last reasoned state court decision to address Buckley's plea agreement, treated the plea agreement as a contract and applied the three-step approach to interpreting contracts required by California law. Initially, we note that there is no mention of or reference to state contract law in the Superior Court's order denying Buckley's habeas petition. Nor is there any discussion of the terms of the plea agreement. Instead, the order addresses whether Buckley was "expressly advised" by the trial court that his sentence was fifteen years to life, and it cites only cases that consider an "advisement" issue — that is, the issue of a trial court's duty to explain the charge and the sentence to a defendant. On the basis of this analysis it concluded that Buckley knew what his sentence would be.[6/] It is evident on the face of its decision that the Superior Court failed to recognize that Buckley's plea agreement constituted a contract that under California law must be construed like all other contracts. As a result, the Superior Court failed to construe the terms of the plea agreement entirely. Accordingly, it failed to apply controlling state law and reached a decision that both in its mode of analysis and its result was contrary to clearly established Supreme Court law.

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6. The Superior Court's order principally cites *In re Moser*, 6 Cal. 4th 342, 354-55 (1993) (although it misspells the case name). *Moser* was a state habeas case in which the defendant pled guilty "after receiving inadequate or erroneous advice from the trial court" with respect to the possible consequences of his plea agreement. *Id.* at 345. As the *Moser* court held, the issue in that case was "misadvisement," not the breach of a plea agreement. *Id.* at 356. Similarly, *United States v. Timmreck*, 441 U.S. 780 (1979), which the Superior Court notes was cited in *Moser*, involves the trial court's failure to properly advise the defendant regarding his sentence as required by Federal Rule of Criminal Procedure 11. Again in *Timmreck*, as in *Moser*, the issue was not the breach of a plea agreement but a breach of the trial court's duty to inform the defendant of certain information.

[4] Considering extrinsic evidence before examining the language of the plea agreement and finding it ambiguous, as the state court did in this case, is further evidence of its failure to apply California contract law. CAL. CIV. CODE § 1638; *Pope v. Allen*, 225 Cal. App. 2d 358, 364 (1964) ("The code provision permitting the showing of surrounding circumstances is not applicable to every contract which comes before a court for interpretation. It is applicable only where the language used in the contract is doubtful, uncertain or ambiguous . . . ."). Moreover, even if the Ventura County Superior Court had first considered the plea agreement's language and concluded that it was ambiguous, the court was not then permitted to use parol evidence to gauge the *subjective* understanding of one of the contracting parties.[7] *See Bank of the West*, 2 Cal. 4th at 1264 65; *Beck v. Am. Health Group Int'l, Inc.*, 211 Cal. App. 3d 1555, 1562 (1989) ("The objective intent . . . not the parties' subjective intent, governs our interpretation."). In failing first to consider the language of Buckley's plea agreement and second to engage in an analysis of the parties' objective intent in entering that agreement, the Superior Court plainly contravened California law. In light of *Santobello* and *Adamson*, its decision falls squarely within the ambit of § 2254(d)(1).

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7. The dissent, on the one hand, argues that the state court's finding that Buckley "well knew" that his sentence was fifteen years to life is entitled to our deference under AEDPA. On the other hand, it concedes that the state court failed both to examine the language of the plea agreement and to apply an objective test to determine the mutual intent of the parties. Dissent at 2833 n.1 ("It is true that the California Superior Court did not specify that the plea agreement should be interpreted pursuant to general contract terms. Nonetheless, the application of those terms would not have changed that court's factual determination."). As to our dissenting colleagues' first point, whether or not the state court's determination of Buckley's subjective state of mind was reasonable is wholly irrelevant. The fact remains that the court failed to apply California contract law or to analyze Buckley's plea agreement in that light, or indeed in any light. Although AEDPA does require deference to a state court's factual findings, it does not permit us, as the dissent suggests, to invent factual findings and then ascribe them to the state court. Nor does it allow us to attribute a theory of law to the state court that it failed to employ.

II

[5] Under AEDPA, even where the state court has committed constitutional error under § 2254(d), "habeas relief may still be denied absent a showing of prejudice." *Medina v. Hornung*, 386 F.3d 872, 877 (9th Cir. 2004). The relevant inquiry in this case is whether the state court's error, which resulted in its finding that the plea agreement mandated an indeterminate prison sentence of fifteen years to life, had a "substantial and injurious effect" on Buckley. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). To answer this question we must determine what Buckley's sentence would have been had the California courts applied California contract law. Where the state court fails to apply Supreme Court law (by failing to apply California contract law) we must ourselves conduct a *de novo* review of that question.

[6] With respect to the first step in California contract analysis, it is clear that the language of Buckley's plea agreement was ambiguous. Critically, the plea agreement contained conflicting paragraphs describing the sentence to be given Buckley upon his plea of guilty to second degree murder. One paragraph, which Buckley initialed, stated, "I could be sentenced to the state prison for a maximum possible term of 15 year(s) . . . . After I have served my prison term, I may be subject to a maximum parole period of LIFE." A different paragraph was added later, after Buckley had already read and initiated the agreement. That paragraph, initialed only by Glynn, stated, "At the time of sentencing the people will move the court to declare the murder to be murder in the second degree, with a maximum term of 15 years to life."[8] Even disregarding the

8. The district court found that the additional paragraph, which was handwritten, was not added until after Buckley saw and initialed the first paragraph. There appears to be no doubt from the record that the district court is correct in this respect. However, the chronology is not important to our outcome here: For purposes of this opinion we attach no weight to the fact that the state's version of the bargained-for sentence was incorporated in the plea agreement after Buckley had reviewed and initialed it, and afford that version equal significance to the paragraph on which Buckley relies, although we note that were we to disregard the subsequently incorporated material, there would be no inconsistency and no ambiguity at all, as Buckley's version of the sentence would be the only one set forth in the plea

timing of the addition of the added paragraph, there is only one reasonable conclusion one can draw from the facts: The language of the plea agreement is ambiguous with respect to Buckley's sentence.

[7] After finding an ambiguity in the language of a contract, we must next attempt to resolve that uncertainty by looking to the "objectively reasonable expectations" of the promisee. *See Bank of the West*, 2 Cal. 4th at 1265; CAL. CIV. CODE § 1649. This inquiry considers the disputed or ambiguous language in the context of the contract as a whole and of the relevant surrounding circumstances. *Nissel v. Certain Underwriters at Lloyd's of London*, 62 Cal. App. 4th 1103, 1111-12 (1998); *see also Bank of the West*, 2 Cal. 4th at 1265 ("This is because language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract." (emphasis and internal quotation marks omitted)).

[8] Applying the second step of California contract analysis in this case does not resolve the ambiguity created by the language of the plea agreement. Read in the context of the entire agreement, the conflicting pronouncements regarding the length of the sentence to be imposed offer no more clarity than they do when read in the abstract. Furthermore, the plea colloquy compounds, rather than cures, this ambiguity. At the January 4, 1988, change of plea hearing, Glynn asked Buckley whether he understood his sentence to be "a maximum possible term of fifteen years," to which Buckley responded, "Yes." However, shortly thereafter, Glynn stated, "Now as I stated before and it's also contained in this Felony Disposition form, that at the time of sentencing the people will ask the Court to declare the murder to be murder in the second degree with a maximum term of fifteen years to life . . . . Do you understand that to be the situation?" Again, Buckley answered, "Yes." Accordingly, the colloquy does no more than replicate the ambiguity and, in turn, lead us to the final step in our contractual analysis.[9]

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agreement.

9. That Buckley subsequently testified at his co-defendant's trial and sentencing both that he had received a sentence of fifteen years to life and that he expected to be released from prison in seven and one half years

[9] The proper interpretation of the plea agreement becomes clear when we turn, as California law provides, to § 1654 of the California Civil Code: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." There is no dispute that both the December 15, 1987, letter from Glynn to Buckley's counsel and the felony disposition statement, which together constituted the plea agreement, were drafted by the prosecutor's office. Thus, we are compelled by § 1654 to construe the ambiguity in the plea agreement — whether Buckley was to receive a determinate fifteen-year sentence or an indeterminate sentence of fifteen years to life — against the state. *See Toscano*, 124 Cal. App. 4th at 345. Given the direct conflict in the terms of the plea agreement, we must adopt the construction of the agreement that is most favorable to Buckley: a maximum prison sentence of fifteen years. Because Buckley instead received an indeterminate prison sentence of fifteen years to life, it is evident that the state breached the plea agreement and that the breach had a "substantial and injurious effect" upon Buckley. *Brecht*, 507 U.S. at 637.

III

[10] As the district court found, Buckley has two available remedies at law for the breach of his plea agreement: withdrawal of his plea (i.e., rescission of the contract) and specific performance. *Buckley*, 266 F. Supp. 2d at 1143; *see also Santobello*, 404 U.S. at 263 (positing the same two alternative remedies). Where a plea agreement is breached, the purpose of the remedy is, to the extent possible, to "repair the harm caused by the breach." *Toscano*, 124 Cal. App. 4th at 345 (citing *People v. Kaanehe*, 19 Cal. 3d 1, 14 (1977)).

[11] In Buckley's case, only one of the remedies appears to us to be viable. Buckley has already fulfilled his obligations

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only compounds the ambiguity further. Finally, given Buckley's later expressed misunderstanding of the relationship between his prison sentence and his parole term, and the absence of any evidence that counsel explained to him the nature of his sentence, his failure to object to the sentence when it was ultimately imposed by no means serves to eliminate the ambiguity.

under the plea agreement, including testifying on behalf of the state against Fauber and Caldwell and serving his bargained for sentence.[10] In so doing, he has "paid in a coin that the state cannot refund." *Brown*, 337 F.3d at 1161. Rescission of the plea agreement cannot repair the harm caused by the state's breach. *See Carter v. McCarthy*, 806 F.2d 1373, 1377 (9th Cir. 1986). That harm can best be addressed by holding the state to its agreement and affording Buckley the benefit of his bargain.[11] Thus, Buckley is entitled to specific performance of the plea agreement: a maximum prison sentence of fifteen years.

We arrive at our decision notwithstanding the state's argument that a determinate fifteen year prison term is not a lawful sentence for second degree murder under California law. Consistent or not with the state's sentencing statute, that is the bargain that California made in 1987. Buckley has fulfilled his promises, and it is now too late for the state to argue that it was not in a position to offer him a fifteen year sentence in exchange. As we stated in *Brown*, addressing an identical argument: "This may be a problem for the state, but not for [the defendant]." 337 F.3d at 1161.

IV

[12] Under *Santobello*, Buckley had a due process right to enforce the provisions of his plea agreement. Under *Adamson*, the state court was required to interpret Buckley's plea

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10. Buckley was taken into custody on November 12, 1987, the date that he was charged with burglary, robbery and first degree murder. The district court granted him habeas relief on December 6, 2002. He was thereafter released.

11. We express no view on what the proper remedy would be in a case with other facts. As the California Supreme Court has held, the appropriate remedy in breach of plea agreement cases depends on the nature of the breach, which party (e.g., the defendant, the prosecutor or the trial court) has breached the agreement, and which party seeks enforcement of the contract. *Kaanehe*, 19 Cal. 3d at 13. To that we would add, "and what has transpired since the agreement was made." Here, we hold only that in a case in which the state has already received the benefit of the bargain, the harm caused by its breach is generally best repaired by specific performance of the plea agreement, although a defendant may, if he so chooses, elect instead to rescind the agreement and take his chances from there.

agreement pursuant to California contract law; in not doing so, it failed to apply clearly established federal law set forth by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). The consequence was that Buckley was sentenced to an indeterminate prison term of fifteen years to life when the bargained-for sentence, to which he was constitutionally entitled, was a maximum of fifteen years. Thus, the state court committed constitutional error that had a substantial and injurious effect on Buckley. He is entitled to habeas corpus relief.

The district court's judgment granting Buckley's petition for a writ of habeas corpus is **AFFIRMED**.

CALLAHAN, Circuit Judge, with whom Tallman, Circuit Judge, joins, dissenting:

I respectfully dissent. The majority notes the standard for relief set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, but then substitutes its factual findings for those of the state court. Although the majority professes to grant relief under § 2254(d)(1), holding that the state court's decision involved an unreasonable application of clearly established federal law, my reading of its opinion is that it actually, and incorrectly, concludes that the state court's decision was based on an unreasonable determination of fact. *See* 28 U.S.C. § 2254(d)(2).

The majority's perspective rests on two premises. First, it asserts that it was established federal law in 1999, that the construction and interpretation of plea agreements were matters of state law and that in California a plea agreement was interpreted according to the same rules as other contracts. Second, the majority concludes that under California law, the uncertainty in the plea agreement requires that the agreement be construed against the state.

I agree with the majority that the construction and interpretation of plea agreements are matters of state law, that

in California plea agreements are interpreted similarly to other contracts, and that here the plea agreement is ambiguous. I also agree that the ambiguity in the plea agreement requires that we look to the expectations of the promisee in the context of the contract as a whole and the relevant surrounding circumstances. I part company with the majority on the conclusions we reach from examining the surrounding circumstances. The majority finds that the surrounding circumstances do not resolve the ambiguity. AEDPA, however, requires that we defer to the state court's factual determination that Buckley "well knew" that he had bargained for a sentence of 15 years to life unless that finding is not supported by substantial evidence. *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). Because I cannot say "that an appellate panel, applying the normal standard of appellate review, could not reasonably conclude that the finding is supported by the record," *see id.* at 1000, I would deny Buckley's petition for a writ of habeas corpus.

In its most recent opinion concerning the interpretation of plea agreements, the California Supreme Court, after reiterating that a plea agreement is interpreted according to general contract principles, wrote:

> "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) On the other hand, '[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.' (*Id.*, § 1649; see *AIU* [*Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807,] 822 [274 Cal. Rptr. 820, 799 P.2d 1253].)" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265, 10 Cal. Rptr. 2d 538, 833 P.2d 545.) "*The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties.* (Civ.

> Code, §§ 1635-1656; Code Civ. Proc., 1859-1861, 1864; [citations].)" (*Morey v. Vannucci* (1998) 64 Cal. App. 4th 904, 912, 75 Cal. Rptr. 2d 573; see also *People v. Toscano, supra,* at p. 345, 20 Cal. Rptr. 3d 923.)

People v. Shelton, ___ P.3d ___, 37 Cal. Rptr. 3d 354, 358 (Cal. 2006) (emphasis added) (alterations in original).

The California Supreme Court proceeded to explain that in resolving the ambiguous plea agreement before it, it would:

> consider the circumstances under which this term of the plea agreement was made, and the matter to which it relates (Civ. Code, § 1647) to determine the sense in which the prosecutor and the trial court (the promisors) believed, at the time of making it, that defendant (the promisee) understood it (*id.*, § 1649).

Id. The court further noted that one interpretation of the agreement was "reinforced by the prosecutor's remarks at the sentencing hearing . . . ." *Id.* at 359. In reaching its conclusion, the court noted that it considered "the totality of the circumstances presented here." *Id.*

Thus, under California law, a judicial determination of the parties' expectations in a plea agreement is not confined to reviewing the four corners of the plea agreement. A plea agreement is not like a contract between two private parties. Rather, in a plea agreement, the prosecutor and the defendant agree to make certain representations to the trial judge who retains the authority to accept or reject those representations. *See Frankel v. Bd. of Dental Examiners*, 46 Cal. App. 4th 534, 551 (Cal. Ct. App. 1996). Furthermore, a plea agreement is often, as in this case, before the trial court on at least two occasions at which various factors that have an influence on the agreement and the parties' expectations may be considered. Here, the trial court first considered the plea agreement at the change-of-plea hearing, and subsequently the trial court considered the provisions of the plea agreement when it sentenced Buckley.

A review of the record in this case shows that the state court

reasonably determined that Buckley's expectation was that he would receive a 15-years-to-life sentence.[1] As noted in the majority opinion, there is some question as to what language was in the plea agreement when Buckley signed it. The record, however, shows that when Buckley testified in Fauber's trial in January 1988, he stated that he had pled guilty to second-degree murder, with a penalty of 15 years to life, in return for the District Attorney not prosecuting him with murder in the first degree, which carried a penalty of 25 years to life, and dropping the robbery and burglary charges. Moreover, at his subsequent sentencing hearing in March 1988, the trial court sentenced Buckley to a prison term of 15 years to life and a parole term of life. Buckley was represented by counsel at the sentencing hearing and did not object to the imposed sentence. Furthermore, the attorney who represented Buckley in 1988 subsequently testified that he had no recollection of negotiating a determinant sentence of 15 years with the District Attorney or discussing such a sentence with Buckley. It was not until 1996 that Buckley advanced the contention that his plea agreement was for 15 years. Perhaps reasonable minds may differ on whether Buckley in 1988 knew that his plea agreement was for 15 years to life, but the state court's determination that he did is not "an unreasonable determination of the facts in light of the evidence presented." *See* 28 U.S.C. § 2254(d)(2): *see also Taylor*, 366 F.3d at 1000 (stating that "it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision;" instead, we must be convinced that the state court "could not reasonably conclude that the finding is supported by the record.").

Finally, I note that this factual determination is further bolstered by the State's representation — not rebutted by the majority or by Buckley — that the allegedly bargained-for sentence of 15 years was illegal under California law.[2] This

1. It is true that the California Superior Court did not specify that the plea agreement should be interpreted pursuant to general contract terms. Nonetheless, the application of those terms would not have changed that court's factual determination. Moreover, the state court's factual finding that Buckley well knew that his bargained-for sentence was 15 years to life resolved the ambiguity in the agreement.

2. For this reason, I also disagree with the majority's holding that Buckley is entitled to specific performance of the plea agreement, as it

too, is part of the relevant surrounding circumstances that a court may consider in determining the parties' intent in entering into a plea agreement. There is nothing in the record to suggest that the prosecutor intended or had any motive to agree to such an illegal sentence. Similarly, there is nothing in the record to suggest that the trial judge was not aware of the statutory sentence for second degree murder or that he intended to approve an illegal sentence.

In this case, the state court — on the basis of the same evidence as Buckley presented in his federal habeas petition — determined that Buckley "well knew that the term of imprisonment for which he was to be committed to prison for the crime of second degree murder was 15 years to life." Pursuant to 28 U.S.C. § 2254(d)(2), this factual determination precludes federal habeas relief unless it is "unreasonable." The fact that the state court did not refer to contract law when determining Buckley's understanding of the plea agreement does not make the state court's factual determination unreasonable. Accordingly, I would vacate the district court's grant of Buckley's petition for a writ of habeas corpus, and deny the petition.

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interprets the agreement. Were I to otherwise agree with the majority, I would vacate the sentence and give Buckley an opportunity to withdraw his plea; thus placing both sides back in the positions they were in prior to their entry into the plea bargain. This is not to suggest that what has transpired since 1988 would not have a substantial impact on the parties' subsequent actions. Rather, my concern is that a federal court should not order the specific performance of a plea agreement in a state court that is illegal under state law.

FILED
AUG 02 2005

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN A. BUCKLEY,	No. 03-55045
Petitioner - Appellee,	D.C.No. CV-00-02435-JSL
v.	**ORDER**
C.A. TERHUNE, Director of the CDC,	
Respondent - Appellant.	

Before: SCHROEDER, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court,[1] it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

1. Judge Hawkins is recused.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN A. BUCKLEY, *Petitioner-Appellee,* *v.* C. A. TERHUNE, Director of the CDC, *Respondent-Appellant.*	No. 03-55045 D.C. No. CV-00-02435-JSL OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
January 9, 2004—Pasadena, California

Filed January 25, 2005

Before: Stephen S. Trott, Johnnie B. Rawlinson, and
Carlos T. Bea, Circuit Judges.

Opinion by Judge Trott;
Dissent by Judge Bea

COUNSEL

Noah P. Hill, Deputy Attorney General, Los Angeles, California, for the respondent-appellant.

Allen Bloom, San Diego, California, for the petitioner-appellee

OPINION

TROTT, Circuit Judge:

C.A. Terhune, Director of the California Department of Corrections, ("State") appeals the district court's grant of Brian Buckley's petition for a writ of habeas corpus. The State's appeal is timely, and we have jurisdiction under 28 U.S.C. § 2253. The district court did not afford the state court's determination of facts the appropriate level of deference. Accordingly, we reverse the judgment of the district court because it resulted from a misapplication of the strict standard of review mandated by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 ("AEDPA").[1]

I

On November 27, 1987, Buckley was charged in Ventura County, California with felony murder, robbery, and burglary. *See* Cal. Penal Code §§ 187(a), 190.2(a), 211, 459. On December 15, 1987, the prosecutor, Donald C. Glynn, wrote Buckley a letter offering a plea bargain. The proposal contemplated that Buckley would testify against suspects Curtis Fauber and Christopher Caldwell as to three murders, but the agreement did not specify the sentence to be imposed should

1. We note that the district court did not have the benefit in 2002 of the Supreme Court's guidance in *Lockyer v. Andrade*, 538 U.S. 63 (2003), or *Miller-El v. Cockrell*, 537 U.S. 322 (2003), when it rendered its decision, not to mention our opinion in *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004).

Buckley accept the offer. Attached to Glynn's letter was a document entitled "Felony Disposition Statement."

According to the Felony Disposition Statement, Buckley was to plead guilty to a violation of California Penal Code section 187 (murder) on Count 1, and the prosecutor was to recommend that the court declare the murder to be murder in the second degree and that the remaining counts be dismissed in the interests of justice. The agreement contained also the following relevant paragraphs, which Buckley initialed:

> F. *CONSEQUENCES OF PLEA* (Defendant to initial)
>
> /BB/ My attorney has explained to me the direct and indirect consequences of this plea including the maximum possible sentence. I understand that the following consequences could result from my plea:
>
> /BB/ I could be sentenced to the state prison for a maximum possible term of *15* year(s).
>
> * * *
>
> /BB/ After I have served my prison term, I may be subject to a maximum parole period of *LIFE*[2] (*In re Carabes*, 144 Cal. App. 3d 927).

At some point in time before Buckley entered his plea of guilty, the prosecutor added — and the prosecutor alone initialed — a *handwritten* paragraph to the Felony Disposition Statement that stated:

> /DCG/ At the time of sentencing the people will

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2. When Buckley signed the Felony Disposition Statement, the "maximum parole period" was blank. It is uncontested, however, that Buckley was consistently informed that he could be subject to parole for life, and that the prosecutor filled in this space with the word "LIFE" at the change of plea hearing on January 4, 1988. Neither Buckley nor the state claim Buckley's parole period should be anything other than life.

> move the court to declare the murder to be murder in the second degree, **with a maximum term of 15 years to life**.

Neither Buckley nor his defense attorney, Willard Wiksell, initialed this paragraph. On December 17, 1987, Buckley signed the prosecutor's December 15, 1987 letter and initialed and signed the Felony Disposition Statement. At the change of plea hearing on January 4, 1988, the prosecutor engaged Buckley in the following colloquy:

> Q: And has your attorney explained all of the consequences of your plea to this charge?
> A: Yes.
> Q: Do you understand that for second degree murder you could be sentenced to state prison **for a maximum possible term of 15 years**?
> A: Yes.
> Q: And do you understand that after serving prison term you'll be subject to a parole period — I'm sorry, your Honor, does the Court know the parole period for second degree murder? I didn't enter that in the document.
>
> The Court: Yes, it's — **the possibility is parole for life**.
>
> Q: (By Mr. Glynn:) All right. I've entered this into the document.[3/] You could be subject to a parole period of life. And you could also be ordered to pay a fine of not less than a hundred dollars nor more than $10,000. Do you understand that?
>
> A: Yes.
>
> * * *
>
> Q: Now as I stated before and it's also contained

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3. At this point, it appears Glynn filled in the blank with the uncontested word "LIFE."

in this Felony Disposition form, that at the time of sentencing the people will ask the Court to declare the murder to be murder in the second degree with **a maximum term of 15 years to life**. And the People's reason for entering into that plea agreement are contained in this document that's attached to the Felony Disposition Statement [the December 15, 1987 letter].

I'd like to go into the terms of this agreement with you. In order — or as your part of the agreement you will agree to cooperate in the trials against Curtis Fauber and Christopher Cogwell[sic], and that you will testify in the Fauber case at all proceedings regarding the murder of Thomas Urell, David Church, and Jack Dowdy, and testify truthfully regarding whatever you know about those murders. Do you understand that to be the situation?

A: Yes.

Q: I'm showing you the Felony Disposition form, this yellow form here, that has some initials B.B. against a number of the paragraphs. . . . And at the end of the form I see the date December 17, 1987 and your signature. Did you sign this document on that date?

A: Yes.

Q: And did you sign this document because you read each of the paragraphs that you have initialed and you understand what's contained in these paragraphs?

A: Yes.

(emphasis added). The prosecutor then asked Buckley if he agreed to testify as a witness for the State against two other defendants, and Buckley responded, "Yes."

The prosecutor's letter and the Felony Disposition Statement were entered into evidence as the written plea bargain agreement. The judge then accepted Buckley's guilty plea to Count 1 on the charge of murder. Sentencing was suspended until after Buckley testified at the trials of Fauber and Caldwell.

At some point on January 4, 1988, defense attorney Wiksell signed the December 15, 1987 letter, and both he and prosecutor Glynn signed the Felony Disposition Statement, which Buckley had already initialed and signed three weeks earlier.

At the sentencing hearing, Judge McGrath began by saying, "It would be my intention to follow the recommendation. That's just an indication to counsel and is subject to change if counsel changes my mind during the argument or evidence." The trial court ordered the probation report filed. The prosecutor moved the court to declare Count 1 to be murder in the second degree and to dismiss Counts 2 and 3. The court granted both motions. The prosecutor then stated for the record that Buckley had complied with all the terms of the plea agreement: "He has been a cooperative witness in all of the phases of the Fauber trial and he has testified at the preliminary hearing in the case against Christopher Caldwell." After a discussion about Buckley's concerns for his safety, the possible options for where to house him, and the nature of the crime, the court sentenced Buckley:

> **The Court does impose the term prescribed by law as 15 years to life.** The Defendant is granted presentence credits by the Court of 110

> days actual time, 55 days good time-work time, a total of 165 days.
>
> The Defendant is ordered to pay a restitution fine of $10,000 to the State Restitution Fund. The Court finds and the Court requests that the clerk show on the Abstract and Minutes that the Defendant's life is in danger in prison because of the testimony that he gave against his co-defendant in this case . . . and that the Court requests that the Department of Corrections give Defendant protective custody status in state prison and seriously consider him as a candidate for out-of-state placement.
>
> * * *
>
> This specific offense carries a parole term for the rest of your natural life once you would be released from the state prison facility. If you should violate a term or condition of parole, you would be placed back into prison for up to one year for any single violation.

(emphasis added). The judge then asked Buckley, "Do you understand that?" Buckley responded, "Yes." No objection was made on his behalf to the sentence as imposed.

Eight years later, Buckley filed a petition for writ of habeas corpus in the Superior Court of California, claiming that the State had breached the plea agreement because Buckley had agreed only to a determinate 15-year sentence, not the indeterminate sentence of 15 years to life the court imposed. At the conclusion of the proceedings occasioned by that petition, the Superior Court found "that with the exception of one statement in the negotiated disposition statement, and a reference at the time of the taking of the plea on January 4, 1988, the records demonstrate that the advisement was that the

sentence would be 15 years to life as provided by law, and that the petitioner well knew this." The court continued:

> Any ambiguity concerning petitioner's understanding. . . is put to rest by petitioner's own statement . . . during petitioner's testimony at the trial of Curtis Fauber that he understood his term of imprisonment would be 15 years to life. This is underscored by the judge's comments at the time the sentence was pronounced on March 1, 1988 . . . .

In addition, the Superior Court took judicial notice of its own records in Buckley's case wherein Buckley indicated, just 33 days after he was sentenced, in his own hand, and without quarrel, that his sentence was "15 years to life, plea bargain." The California Court of Appeal and the California Supreme Court both summarily denied Buckley's successive petitions.

Dissatisfied with this result, Buckley petitioned for a writ of habeas corpus in the United States District Court for the Central District of California. The court referred the case to a magistrate judge and granted an evidentiary hearing. Following the hearing, the court adopted the magistrate's report, making findings of fact and ultimately holding that "to the extent that the state court's ruling is properly characterized as a factual finding, it is an incorrect and unreasonable one, and petitioner has met his burden of demonstrating by clear and convincing evidence that it is erroneous." *Buckley v. Terhune*, 266 F. Supp. 2d 1124, 1141 (C.D. Cal. 2002) (citation omitted). The court opined that "[t]he Superior Court's findings and conclusion rest on a flawed foundation. It lacked the benefit of an evidentiary hearing during which it could have developed the record regarding any discussions or advice which occurred off the record." *Id.* After considering evidence, much of which without excuse Buckley did not present to the state court, the district court ultimately found that

Buckley understood he would receive a 15-year determinate sentence and granted the petition, ordering his release from custody "upon the expiration of [his] 15 year sentence." *Id.* at 1143-44.

II

A.

We review the district court's decision to grant a 28 U.S.C. § 2254 habeas petition *de novo*, as we do issues of law — including the proper application of the law to the facts. *Nunes v. Mueller*, 350 F.3d 1045, 1051 (9th Cir. 2003). We review findings of fact made by the district court for clear error. *Id.*

[1] Under the AEDPA, § 2254 habeas petitions "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim — (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an *unreasonable determination of the facts in light of the evidence presented in the State court proceeding*." 28 U.S.C. §§ 2254(d)(1), (2) (emphasis added). Additionally, § 2254(e)(1) states: "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B.

[2] When reviewing state convictions, the principles of comity and federalism embodied in the relevant sections of the controlling federal habeas statute militate against substituting our judgment for that of the state courts. As the Supreme Court explained in *Williams v. Taylor*, 529 U.S. 362

(2000), § 2254(d)(1) "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Id.* at 412. As we recently stated, "[A] federal court may not second-guess a state court's factfinding process unless, after review of the state-court record, it determines that the state court was *not merely wrong, but actually unreasonable*." *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004) (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (emphasis added); *Torres v. Prunty*, 223 F.3d 1103, 1107-08 (9th Cir. 2000) (same standard of unreasonableness applies under subsections (d)(1) and (d)(2)).

[3] In *Maddox*, this circuit established a two-part analysis under §§ 2254(d)(2) and (e)(1). First, federal courts must undertake an "intrinsic review" of the state court's factfinding under the "unreasonable determination" clause of § 2254(d)(2). *Id.* at 1000. The intrinsic review requires federal courts to examine the state court's factfinding process, not its findings. We noted that "intrinsic challenges to state-court findings pursuant to the 'unreasonable determination' standard come in several flavors, each presenting its own peculiar set of considerations." *Id.* at 1000-01 (listing, e.g.: "where the state court should have made a finding of fact but neglected to do so[;] . . . where the state court does make factual findings, but does so under a misapprehension as to the correct legal standard[;] . . . and, where the fact-finding process itself is defective").

[4] "Once the state court's factfinding process survives this intrinsic review — or in those cases where petitioner does not raise an intrinsic challenge to the facts as found by the state court — the state court's findings are dressed in a presumption of correctness," as laid out in 28 U.S.C. § 2254(e)(1). *Id.* at 1000. That presumption

> helps steel them against any challenge based on

> extrinsic evidence, *i.e.*, evidence presented for the first time in federal court. AEDPA spells out what this presumption means: State-court fact-finding may be overturned based on new evidence presented for the first time in federal court only if such new evidence amounts to clear and convincing proof that the state-court finding is in error.

Id. (citation omitted).

III

In this appeal, we are presented with two competing versions of the facts — those found by the state court, on one hand, and those found by the federal court, on the other. According to the Ventura County Superior Court, Buckley "well knew" that he pleaded guilty in exchange for an indeterminate sentence of 15 years to life, but according to the United States District Court, the Superior Court's finding "is an incorrect and unreasonable one." *Buckley*, 266 F. Supp. 2d at 1141. The district court concluded that Buckley reasonably "understood that he was receiving a sentence of no more than 15 years." *Id.* at 1141.

As the competing findings demonstrate, the record regarding the terms of the plea agreement in this case is subject to dispute. Nevertheless, the issue we must first decide is not which of these versions of the facts is correct, but whether the district court correctly concluded that the Superior Court's version is an unreasonable one. *See* 28 U.S.C. §§ 2254(d)(2), (e)(1). We focus on the decision of the Superior Court as the "last reasoned decision," because the California Court of Appeal and Supreme Court summarily denied Buckley's successive habeas petitions without comment. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991).[4/]

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4. Buckley asserts that the *Ylst* doctrine would not apply here

A.

Following the construct established in *Maddox*, first we undertake an "intrinsic review" of the state's factual finding process. In order to do so with the precision required by the statute and our controlling precedents, we ordered the parties to provide us with the complete record of Buckley's state habeas proceedings in the Ventura County Superior Court — which they did. We asked them also to give us their views on the impact of *Maddox* in this case — which they have also done.

What we find in the Superior Court record is as follows:

1. Petitioner Buckley's petition for a writ of habeas corpus dated March 28, 1996.

2. Five supporting evidentiary exhibits to his petition:

   a. The felony complaint filed against the petitioner. (Ex.#1)

   b. The plea agreement negotiated in return for his testimony against Curtis Fauber and Christopher A. Caldwell. (Ex.#2)

   c. The Superior Court felony disposition statement memorializing Buckley's plea of guilty and all the required waivers. (Ex.#3)

   d. A reporter's transcript dated January 4, 1988, of

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because he filed a new habeas petition at each state level as allowed under California law, rather than appeals from the Superior Court's decision, and he presented a new piece of evidence to the Court of Appeal and Supreme Court. We find this distinction immaterial on the facts of this case because Buckley asserted the same errors in his successive petitions, and the new evidence presented by Buckley to the Court of Appeal and Supreme Court was irrelevant to the formation of the plea agreement.

the entry of the plea of guilty to second degree murder. (Ex.#4)

e. A reporter's transcript dated March 1, 1987, of Buckley's sentence (without objection) to "the term prescribed by law as 15 years to life." (Ex.#5)

3. Respondent district attorney Bradbury's return to Buckley's petition dated July 12, 1996, supplemented by an addendum dated July 15, 1996.

4. A supporting evidentiary declaration by the prosecutor, Donald C. Glynn.

5. Exhibit A to the Glynn declaration consisting of a reporter's transcript dated January 7, 1988, of Buckley's guilt phase testimony against Curtis Fauber indicating that his anticipated sentence was "15 years to life."

6. A Superior Court order dated July 22, 1996, directing Buckley to file a traverse, or an answer, to the prosecutor's return, and ordering a specific response to the "factual allegations set forth in paragraph 12, paragraph 13, and paragraph 14, wherein it appears that petitioner was well aware at the time of the entry of his plea to second degree murder that the punishment was 15 years to life."

7. Buckley's responsive traverse dated August 21, 1996.

8. The Superior Court's order dated September 10, 1996, denying the petition.

9. Court Exhibit #1 to its September 10, 1996, order consisting of Buckley's petition for writ of appeal "from his conviction dated April 3, 1988, and indicating in his own hand that his sentence was "15 years to life, plea bargain."

[5] What we do not find in the record — or in Buckley's counsel's response to our order to produce the record — is any indication that Buckley asked for or was denied either: (1) an opportunity to develop or to offer additional evidence; (2) an opportunity orally to argue in support of his petition; or (3) an evidentiary hearing in open court on any of the issues. What we deduce instead is that Buckley was content to have the claims in his petition decided upon the extensive written evidentiary record and argument submitted by both sides, which is exactly what transpired. The final document in Buckley's response to our order is a declaration of mailing to the parties of the Superior Court's order denying writ of habeas corpus, dated September 10, 1996. Conspicuous by its absence is any request by Buckley for reconsideration.

Here, we take note of what appears to be an omission of important information in Buckley's evidentiary submission to the Superior Court. Buckley's evidentiary Exhibit #4 is a copy of a transcript of Buckley's arraignment on Monday, January 4, 1988, and the entry of his guilty plea. The pages of the reporter's transcript itself are consecutively numbered 1-13. However, page 12 was omitted from this Exhibit and does not appear in the parties' recent submissions to this court. Why is this important? Because, as pointed out by the prosecutor in 1996 in his return, the missing page 12 of Buckley's Exhibit #4 quotes Buckley's counsel's description of Buckley's sentence during his arraignment and in his client's presence as "15 to life." Here is the exchange, which Buckley apparently did not include in his exhibit to the Superior Court:

> The Court: I'm leaving this department [at] the end of January. If you gentlemen like and the defendant requests, I'll keep the case for sentencing, or you can keep this case here. . . . But whatever you want to do is fine with me.

[Buckley's counsel responded:] Why don't you — normally wouldn't make any difference because **it's a second degree murder and you can only sentence him to 15 to life**.

(emphasis added).

[6] From the foregoing, we conclude that petitioner had a full, fair, and complete opportunity to present *evidence* to the state courts — of which he took full advantage. He had an evidentiary hearing, albeit on the written record. In his petition to the Superior Court, he included five evidentiary exhibits. The Superior Court judge referred to the evidence on the record before him, asked for and received a response to certain factual assertions and submissions by the respondent, and then made a reasoned decision "in light of the evidence presented." 28 U.S.C. § 2254(d)(2). Thus, the state court's factfinding process easily survives an intrinsic review. We find no defect whatsoever in the process invoked by Buckley and employed by the Superior Court.

[7] The error made here by the district court was in believing — on the basis of evidence *not* submitted to the Superior Court — that because the Superior Court did not conduct an open evidentiary hearing and solicit additional input, its process was flawed and its findings did not need to be honored in federal court. To reiterate, the magistrate judge's report and recommendation says, "[t]he Superior Court's findings and conclusions rest on a flawed foundation. It lacked the benefit of an evidentiary hearing during which it could have developed the record regarding any discussions or advice which occurred off the record." *Buckley*, 266 F. Supp. 2d at 1141. He continued, "to the extent that the state court's ruling is properly characterized as a factual finding, it is an incorrect and unreasonable one, and petitioner has met his burden of demonstrating by clear and convincing evidence that it is erroneous." *Id.* (citation omitted).

[8] In *Mendiola v. Schomig*, 224 F.3d 589, 592-93 (7th Cir. 2000), the Seventh Circuit noted the differences between pre-AEDPA § 2254(d) and the current § 2254(e)(1). *Id.* The latter "does not require findings to be based on evidentiary hearings." *Id.* Under this rationale, the magistrate in this case erred by determining that because the California Superior Court's finding was not based on a separate evidentiary hearing it is not entitled to deference under the AEDPA. As the *Mendiola* court noted, "[i]f a state court's findings rest on thin air, the petitioner will have little difficulty satisfying the standards for relief under § 2254. But if the state court's finding is supported by the record, even though not by a 'hearing on the merits of the factual issue', then it is presumed to be correct." *Id.* (quoting 28 U.S.C. § 2254(d) (1994) (pre-AEDPA)). We agree with our sister circuit: we do not read either the AEDPA or *Maddox* as mandating an in-court evidentiary hearing under all circumstances. The question is whether the factfinding process was fatally defective. Moreover, petitioner challenged the state court's finding in his federal habeas petition on the basis that it was simply wrong, *not* on the basis that the factfinding process was intrinsically flawed.

We note here that all the "new" evidence petitioner brought to the district court's attention was not evidence that was unknown or unavailable to the petitioner in state court — to the contrary. In this respect, his federal presentation to the district court runs afoul of the requirement that before he can obtain federal habeas relief, he must have fairly presented his claims to the state court. As the Supreme Court said in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992):

> It is hardly a good use of scarce judicial resources to duplicate factfinding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings.

> Furthermore, ensuring that full factual development of a claim takes place in state court channels the resolution of the claim to the most appropriate forum. The state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings. This is fully consistent with, and gives meaning to, the requirement of exhaustion. . . . Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful.
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> * * *
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> The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court. Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court.

Id. at 9-10.

In this connection, § 2254(e)(2) provides as follows:

> If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless [petitioner] shows that —

> (A) the claim relies on —
>
> (i) a new rule of constitutional law . . . ; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [petitioner] guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

In *Williams v. Taylor*, 529 U.S. 420 (2000), the Supreme Court interpreted this statute as follows in connection with a petitioner's responsibility fully to develop the record in state court:

> For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings. Yet comity is not served by saying a prisoner "has failed to

> develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent effort. In that circumstance, an evidentiary hearing is not barred by§ 2254(e)(2).

Id. at 437.

When the "stringent requirements" of § 2254(e)(2) are cast in terms of a petitioner's dispute with his sentence, and whether the facts underlying his claim would have been such that no reasonable factfinder could have found against him, we are persuaded that he fails to satisfy this test — as will become evident from our extrinsic review of the factfinding process. *See infra* Part III B. *See also Baja v. Ducharme*, 187 F.3d 1075, 1079 (9th Cir. 1999) (a petitioners indefensible failure in state court to advance evidence in support of his federal claim bars him pursuant to § 2254(e) from an evidentiary hearing in federal court).

[9] State courts cannot be expected, *sua sponte*, to order testimonial evidentiary hearings when they are not requested or when the need for such a hearing is not apparent from the material submitted. Where, as here, the state court considered all of the evidence submitted by the petitioner and did not refuse the petitioner the opportunity to develop those claims — indeed, the court solicited more factual input and argument — we cannot conclude that the decision "was based on an *unreasonable determination of the facts in light of the evidence presented in the State court proceeding*." 28 U.S.C. § 2254(d)(2) (emphasis added).

B.

[10] Having concluded that the state court employed a proper process in determining the facts, *Maddox* next instructs us to undertake an "extrinsic review" under 28 U.S.C. § 2254(e)(1) of the state's factfinding process. In this setting,

the AEDPA "steels" the state court findings with a presumption of correctness. *Maddox*, 366 F.3d at 1000. "[The] presumption means: State-court fact-finding may be overturned based on new evidence presented for the first time in federal court only if such new evidence amounts to clear and convincing proof that the state-court finding is in error." *Id.* (citation omitted).

[11] As noted above, contradictory statements regarding petitioner's sentence appear in the Superior Court record. Nonetheless, that record contains evidence and information sufficient to support the Superior Court's conclusion. As we have explained, during his testimony against Curtis Fauber, Buckley himself contemporaneously described his expected sentence, in return for his cooperation, to be the standard term of "15 years to life," as did his own attorney at the time of his plea. Moreover, Buckley repeated this understanding shortly after his sentence in his petition for writ of appeal: "15 years to life, plea bargain." Given this evidence, we find it impossible to say that the Superior Court's findings of fact as to Buckley's contemporaneous understanding and the nature of the plea bargain to amount to an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2).

Petitioner relies heavily on the alleged failure of the Superior Court to consider Buckley's testimony during the *penalty* phase of his co-defendant's trial. When asked during that trial when he believed he would be *released* from prison, Buckley replied, "Seven and a half years." However, Buckley did not present this evidence to the Superior Court. Moreover, this evidence is contradicted by his testimony during the *guilt* phase of that trial, where he stated that he understood his sentence to be "15 years to life." Furthermore, his first statement does not conclusively determine that he understood he was facing a determinate 15-year sentence. As the State points out, then extant California law regarding application of

good time credits to sentences of 15 years to life was unclear, so Buckley could have understood he would serve only half of the indeterminate sentence. *See In re Oluwa*, 207 Cal. App. 3d 439, 442 (1989) (holding that "persons serving sentences of 15 years to life for second degree murder are not eligible to receive the 1-for-1 custody credits . . . but only 1-for-2," which results in a minimum sentence of 10 years rather than 7-1/2 years).

At the federal evidentiary hearing, Buckley, his mother, his attorney Willard Wiksell, prosecutor Donald Glynn, and investigator Larry Troxel testified regarding Buckley's plea negotiation and agreement. Again, the various witnesses presented conflicting testimony. Wiksell, Buckley's trial counsel and a practiced defense attorney who had tried "hundreds" of criminal cases prior to representing Buckley, testified that he told his client he would receive the standard sentence for second-degree murder, 15 years to life. This testimony finds support in the missing page from Buckley's Exhibit #4, where Wiksell describes his client's sentence during his arraignment as "15 to life." [Evid. Hearing Tr. 129]. As related above Buckley testified also that he thought he was getting the standard sentence. Troxel, who was not present during any part of the actual plea negotiation, testified that the prosecutor represented Buckley's sentence to him as a 15-year sentence. [Evid. Hearing Tr. 15-17]. Buckley's mother testified that she met with Glynn, who explained to her that Buckley would probably only serve seven and a half years. [Evid. Hearing Tr. 32]. She testified also that in a conversation in an elevator, Troxel, who had no authority to participate in any part of the plea bargain, told her Buckley was receiving a 15-year determinate sentence. [Evid. Hearing Tr. 33].

This contradictory testimony does not amount to "clear and convincing" evidence that the Superior Court's finding was in error. Here, we are faced with evidence that might support either conclusion. Buckley's evidence is anything but clear,

and not at all convincing. In cases such as this, we "may not second-guess a state court's fact-finding process unless, after review of the state-court record, [we] determine[ ] that the state court was *not merely wrong, but actually unreasonable*." *Maddox*, 366 F.3d at 999 (citations omitted) (emphasis added). "To secure habeas relief, petitioner must demonstrate that a state court's finding of [fact] was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003).

[12] Of consequence in this analysis is the fact that we are examining a state court's construction of the terms of a plea agreement. The Supreme Court addressed this situation in *Ricketts v. Adamson*, 483 U.S. 1 (1987), a case that reversed our holding regarding the provisions of a state court plea agreement. In its opinion, the Court offered this authoritative guidance:

> [O]nce a state court has, within broad bounds of reasonableness, determined that a breach of a plea agreement results in certain consequences, a federal habeas court must independently assess the effect of those consequences on federal constitutional rights. This independent assessment, however, proceeds without second-guessing the finding of a breach and is not a license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation.
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> * * *
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> [T]he construction of the plea agreement and the concomitant obligations flowing therefore are, within broad bounds of reasonableness, matters

> of state law, and we will not disturb [the state court's] reasonable disposition of those issues.

Id. at 5 n.3. In fine, Buckley has not demonstrated that the Superior Court's factual determination was objectively unreasonable, and he has not carried his "burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

CONCLUSION

[13] Because the state court's determination of the facts was not unreasonable under the AEDPA, we reverse the district court's decision granting Buckley's § 2254 habeas petition.

REVERSED; PETITION DENIED.

BEA, Circuit Judge, dissenting:

Were I simply to disagree with the weight to be given the evidence, or the conclusions drawn therefrom, I would not further encumber the Federal Reports by writing a dissent. It is because I see this case as being controlled by 28 U.S.C. § 2254(d)(1), whereas the majority apply section 2254(d)(2), that I respectfully dissent. When judges' criteria pass each other without acknowledgment, like ships on a dark night, at least one should blow a horn.

Next, were the relevant legal issues whether Buckley "understood" or "knew" or "believed" he was pleading to a "15 years to life" sentence rather than a "15 years maximum" sentence, I would agree with the majority. There is sufficient evidence in the record made before the Ventura County Superior Court on the habeas hearing so that its finding that Buckley "well knew" he was pleading to "15 years to life" was

not "unreasonable." 28 U.S.C. § 2254(d)(2).[1/]

But the proper focus of enquiry is not on section 2254(d)(2), but on section 2254(d)(1).[2/] At the time of the state habeas proceeding, clearly established Federal law, as determined by the Supreme Court, made the interpretation and construction of a plea agreement a matter of state law. *Ricketts v. Adamson*, 483 U.S. 1, 5 n.3 (1987) (holding that "the construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law"). Under California law, plea agreements are governed by the rules of contract law. *People v. Toscano*, 20 Cal. Rptr. 3d 923, 926 (Cal. Ct. App. 2004) ("a plea agreement is interpreted according to the same rules as other contracts").

When the sentencing judge failed either to sentence Buckley according to the parties' intent as objectively manifested in the agreement or to give Buckley an opportunity to withdraw his plea, the sentence imposed violated Buckley's constitutional rights because it rendered his plea involuntary. The breach of a plea agreement by failing to properly advise a criminal defendant of his potential sentence is a violation of due process. *Santobello v. New York*, 404 U.S. 257, 262 (1971). Where a defendant is misled as to the consequences of his plea, it renders the plea involuntary. *Williams v. Taylor*, 529 U.S. 420, 431-33, 437-38 (2000).

By looking at the subjective understanding of one of the

1. Similarly irrelevant is whether the district court should have held an evidentiary hearing. I quite agree with the majority: it was not necessary to develop the construction of the plea agreement.

2. Under 28 U.S.C. § 2254(d)(1), a habeas petition should be granted where the state court opinion "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Throughout the majority opinion there is no analysis of whether the state court decision violated clearly established federal law so as to fall within 28 U.S.C. § 2254(D)(1).

parties to interpret the plea agreement, rather than looking at the objective manifestation of the parties' intent as California law requires, the state court based its decision on irrelevant evidence and reached an irrelevant determination of fact. What a party to a contract "knew or did not know" is irrelevant where, as here, there are no claims of mistake, misrepresentation or fraud.

Rather, the proper analysis under California law is: (1) What were the terms of the plea bargain at the time the contract was formed? (2) Was there a valid modification of those terms? (3) Did the trial judge either (a) sentence the defendant in accordance with the terms of the plea bargain, or (b) advise the defendant that the judge would not do so and give the defendant an opportunity to withdraw his guilty plea?

When analyzed according to the applicable California contract law, the evidence shows that a contract was formed that specified a determinate prison term of 15 years with the possibility of life parole. Any attempted modification of that contract to change the prison term to "15 to life" was invalid for lack of new consideration.[3/] However, Buckley was not sentenced according to the agreed upon terms in the plea bargain, nor was he given an opportunity to withdraw his guilty plea. Accordingly, I would affirm the district court's grant of habeas corpus, albeit not on the rationale used by the district court.

I

We review the district court's decision to grant a 28 U.S.C. § 2254 habeas petition *de novo* as we do issues of law, including the proper application of the law to the facts. *Nunes v. Mueller*, 350 F.3d 1045, 1051 (9th Cir. 2003). We review

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3. The phrase "15 to life" means an indeterminate prison term for a minimum of 15 years to a maximum of life, subject to an early release at the discretion of The Board of Prison Terms, California's parole board.

findings of fact made by the district court for clear error. *Id.* "We may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale." *Id.*

II

Under both federal and California law, "[p]lea agreements are contractual in nature and are measured by contract law standards." *United States v. De La Fuente*, 8 F.3d 1333, 1337 (9th Cir. 1993) (citation omitted). *See also People v. Toscano*, 20 Cal. Rptr. 3d at 926 (following Ninth Circuit law) ("a plea agreement is interpreted according to the same rules as other contracts"); *People v. Knox*, 20 Cal. Rptr. 3d 877, 880 (Cal. Ct. App. 2004) (in construing the terms of a plea agreement, courts should employ contract law standards and "should first look to the specific language of the agreement") (citation omitted). Federal law requires that the plea bargain agreement in this case be analyzed in terms of California contract law. *De La Fuente*, 8 F.3d at 1337; *see also*, *Ricketts*, 483 U.S. at 5 n.3.

The subjective understanding of one of the parties, no matter how accurately delved, is irrelevant to the formation of a contract, unless a mistake is alleged. 1 WITKIN SUM. OF CAL. LAW § 365 (9th ed. 1990). Rather, where ambiguities as to the parties' objectively manifested intent exist, California law is clear: the California Civil Code provisions for interpretation of contract ambiguities must be followed and must be followed in the order provided in the Civil Code. *Bank of the West v. Superior Court*, 833 P.2d 545, 551-52 (Cal. 1992).

A. *Plain Meaning*

Under California contract law, one first looks at the plain meaning of the agreement. CAL. CIV. CODE § 1644 ("The words of a contract are to be understood in their ordinary and

popular sense, rather than according to their strict legal meaning."). Here, the written contract[4] has two conflicting terms in it. In one paragraph, it states: "I could be sentenced to the state prison for a maximum possible term of *15* years(s). . . . After I have served my prison term, I may be subject to a maximum parole period of *Life*." These paragraphs were initialed by Buckley. But another paragraph states: "At the time of sentencing the people will move the court to declare the murder to be murder in the second degree, with a maximum term of 15 years to life." This paragraph was handwritten, unlike all other portions of the Felony Disposition Statement, which were typewritten. It was initialed only by the prosecution, not by Buckley.[5]

Buckley submitted a declaration to the state court stating that at the time he accepted the offer by signing the plea agreement, this latter paragraph stating he could be sentenced

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4. The plea offer letter dated December 15, 1987, together with the Felony Disposition Statement, constituted an offer which required acceptance in a form certain: Buckley was to initial certain required paragraphs, sign and date the offer. Once an offer is accepted in the form required, a contract exists. *See Palo Alto Town & Country Village, Inc. v. BBTC Co.*, 521 P.2d 1097, 1098-99 (Cal. 1974). True it is that the plea agreement is not effective as a basis for sentencing unless and until accepted by the sentencing judge. *Toscano*, 20 Cal. Rptr. 3d at 926; *People v. Rhoden*, 75 Cal.App. 4th 1346, 1354 (1999). But once the terms of the contract are ascertained by rules of contract interpretation, and the plea agreement and plea are accepted by the sentencing judge, the sentence must be based on that agreement, regardless the prosecutor's wish to change the terms of the agreement. *Toscano*, 20 Cal. Rptr. 3d at 927. In addition, the verbal exchange on January 4, 1988, could not have constituted a modification to the agreement already formed on December 17, 1987, because the prosecutor did not offer, nor did Buckley bargain for or accept, any new consideration. *See* CAL. CIV. CODE § 1698.

5. The majority asserts that this paragraph was added to the Felony Disposition Statement before Buckley pleaded guilty. All the record shows is that this paragraph was added at some point in time—but when it was added is unknown. What we do know is that neither Buckley nor his attorney initialed the paragraph, and Buckley agreed only that he had read each paragraph he initialed, not this added paragraph.

to "15 years to life" was not in the plea agreement. However, his and his counsel's signatures appear at the end of the document, after the handwritten paragraph Buckley did not initial. And the prosecutor testified at the district court hearing, that it was his usual custom and practice to fill out all portions of the plea agreement before sending it to the defense attorney, although he had no independent recollection of this plea agreement. If one were to assume that the prosecutor followed his usual practice in this case, a trier of fact could reasonably find there are directly conflicting provisions in the plea agreement. Thus, an ambiguity remains in the written contract.

B. *Reasonable Expectation of Promisee*

When an ambiguity remains in the wording of the contract after application of the plain meaning rule in section 1644, under *Bank of the West, supra*, the next step is to go to California Civil Code section 1649, which states: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor [here, the prosecutor] believed, at the time of making it, that the promisee [here, Buckley] understood it." Now the evidence from the colloquy becomes relevant. At the change of plea hearing on January 4, 1988, the prosecutor, reading from the plea agreement, asked Buckley if he understood that he was to be sentenced to "a maximum possible term of 15 years" with the possibility of parole for life. Buckley responded: "Yes." Shortly thereafter, the prosecutor said: "Now *as I stated before [sic: the prosecutor had stated no such thing]* and it's also contained in this Felony Disposition form, that at the time of sentencing the people will ask the Court to declare the murder to be murder in the second degree with a maximum term of 15 years to life."[6/]

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6. This exchange between the prosecutor and Buckley reminds one of another famous exchange:

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone,"it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

Here again, the terms conflicted.

The prosecutor then asked Buckley if he agreed to testify as a witness for the state against two other defendants and Buckley responded: "Yes." Buckley's final answer in this exchange cannot reasonably be interpreted to mean that he was agreeing to a sentence of 15 years to life because he was never directly asked that question.[7] Hence, the ambiguity still remains.

C. *Contra Proferentem (Against the Drafter)*

If the ambiguity is not resolved by the analysis set forth in sections 1644 and 1649, then *Bank of the West* tells us one must look to California Civil Code section 1654, which states: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." *See also Bank of the West*, 833 P.2d at 551-52; *Toscano*, 20 Cal. Rptr. 3d at 926 ("ambiguities are construed in favor of the defendant"). Here, finally, there is no ambiguity.

It is undisputed that the prosecutor drafted both the December 15, 1987 letter and the Felony Disposition Statement comprising the plea agreement. Accordingly, under section 1654, the plea agreement must be construed in Buckley's favor as providing for a determinate sentence of 15 years maximum, with life parole.

"The question is," said Humpty Dumpty, "which is to be master—that's all."
Lewis Carroll, *Through the Looking Glass and What Alice Found There*, *in* THE ANNOTATED ALICE: THE DEFINITIVE EDITION 213 (Martin Gardner ed., Norton Publishers) (2000).

7. From the exchange between the prosecutor and Buckley, it is clear that Buckley agreed to cooperate in the trials of two other defendants. The prosecutor's representations and his *voir dire* of Buckley in the presence of the court were not for the purpose of forming a contract, but to assure the court Buckley understood the terms of the agreement as required under California law. CAL. PENAL CODE § 1192.5.

By failing to analyze the plea agreement under California contract law, the state superior court failed to apply clearly established federal law as set forth by the Supreme Court. 28 U.S.C. § 2254(d)(1); *Ricketts v. Adamson*, 483 U.S. at 5 n.3.

"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971).[8/]

Here, because the plea agreement is ambiguous, it must be construed in favor of Buckley and against the prosecution. Therefore, even on the state court record alone, Buckley's interpretation must prevail, and his sentence is a determinate sentence of 15 years, with the possibility of life parole.

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8. Another, but not essential, way of looking at this is based on *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004). Once the superior court focused on what Buckley "understood, knew or believed" (his subjective knowledge) rather than the objective manifestation of the parties' intent as documented in their written offer and acceptance, the superior court's factfinding process was not only wrong, it was unreasonable. 28 U.S.C. § 2254(d)(2). *Taylor v. Maddox* did not limit our review of the state court's fact-finding process to whether the state court needed to hold a hearing. The state court's fact-finding process is also unreasonable under 28 U.S.C. § 2254(d)(2):

> where the state court does make factual findings, but does so under a misapprehension as to the correct legal standard. *See, e.g.*, *Caliendo v. Warden*, 2004 WL 720362, at *6 (9th Cir. Apr. 5, 2004); *Fernandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002); *Wade v. Terhune*, 202 F.3d 1190, 1197 (9th Cir. 2000). Obviously, where the state court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness [under 28 U.S.C. § 2254(e)(1)] can attach to it.

Taylor, 366 F.3d at 1001. That is exactly what happened here. The state court—and the majority—seek to interpret the terms of the plea agreement by one party's subjective understanding, rather than the objective manifestation of the parties' intent. Accordingly, the state court's construction of the plea agreement is not entitled to the special deference under 28 U.S.C. § 2254(e)(1) that the majority opinion gives to it.

In support of his interpretation, Buckley's declaration submitted with his habeas petition showed that he thought the terms "15 years with a parole period of life" and "15 years to life" meant the same thing since the prosecutor himself used the terms interchangeably. The district court found Buckley's testimony credible because he had not initialed the handwritten paragraph and the prosecutor did not have a clear memory of the events.

Although superfluous under our analysis because neither mistake nor modification are properly before us, the district court found Buckley's belief that his maximum possible sentence was a determinate term of fifteen years was reasonable under the circumstances. The district court also found that Buckley had no reason to suspect that the prosecutor had attempted to change the terms of the plea agreement until a probation officer finally informed Buckley that the term "15 to life" meant he could serve a life sentence in prison. This finding is not clearly erroneous. *See Nunes*, 350 F.3d at 1052.

Once the prosecutor realized he had made a mistake, he had several opportunities to remedy it. Upon realizing that he had said "a maximum possible term of 15 years" when he meant to say "15 to life," the prosecutor could have corrected his mistake and made certain that Buckley understood the difference before Buckley's guilty plea was accepted and before Buckley testified, at some risk to his life, at the trials of Fauber and Caldwell. Having failed to correct his mistake in time, and having taken advantage of Buckley's reliance on the original terms of the contract by obtaining the benefit of Buckley's testimony at the other trials, the state is now estopped from arguing that the plea agreement should not be enforced. *See People v. Collins*, 45 Cal. App. 4th 849, 864-865 (1996). When a guilty plea is entered in exchange for specified benefits, both parties must abide by the terms of the agreement. *Id.* at 862-63; *Santobello v. New York*, 404 U.S. at 262 (1971).

III

The constitutional violation occurred when the sentencing judge failed to either sentence Buckley in accordance with the terms of his plea agreement, or give Buckley an opportunity to withdraw his plea. The judge was not free simply to alter the terms of the plea agreement, even unwittingly.

At the March 1, 1988 sentencing hearing, the trial judge said he intended to follow the recommendation in the plea bargain. The prosecutor stated for the record that Buckley had complied with all the terms of the plea agreement: "He has been a cooperative witness in all of the phases of the Fauber trial and he has testified at the preliminary hearing in the case against Christopher Caldwell." After a discussion about Buckley's concerns for his safety, the possible options for where to house him, and the nature of the crime, the court sentenced Buckley to "15 years to life" with "a parole term for the rest of your natural life once you would be released from the state prison facility." No objection was made to the sentence as imposed. Although the sentencing judge indicated an intent to sentence Buckley in accordance with the plea agreement, Buckley's sentence of fifteen years to life does not correctly reflect the terms of the plea agreement.

California law gives the defendant the ability to opt out of the plea bargain if the court does not approve of the recommended sentence. *See* CAL. PENAL CODE § 1192.5; *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003). This does not render the terms of the plea bargain any less enforceable. *Brown*, 337 F.3d at 1160-61.

When accepting a guilty plea the trial court must assure that the defendant understands the consequences of his plea. *See* CAL. PENAL CODE § 1192.5.[9/] Prior to sentencing, the judge

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9 "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise

should have made certain that Buckley either agreed to the indeterminate term, or given Buckley the opportunity to withdraw his guilty plea. The judge should have clarified the terms of the plea agreement when the prosecutor first stated that Buckley could be sentenced to a "maximum possible term of 15 years," with parole for life, and later said Buckley could be sentenced to a "maximum term of 15 years to life." *See Brown v. Poole*, 337 F.3d at 1161 (holding that a prisoner was entitled to specifically enforce an oral plea agreement for seven and a half years, even though she would not ordinarily be eligible for parole for ten years under the law). Even though no one appeared to notice this switch in the terms of the contract, "[t]hat the breach of agreement was inadvertent does not lessen its impact." *Santobello*, 404 U.S. at 262.

The failure properly to advise a criminal defendant of his potential sentence is a violation of due process which renders his plea involuntary. *Williams*, 529 U.S. at 431-33, 437-38; *Santobello*, 404 U.S. at 262.

IV

Finally, the state argues that even if this court finds that the plea agreement was breached, the appropriate remedy is to remand the case back to state court so that Buckley can change his plea to not guilty and stand trial for the offense. Although

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provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. If the court approves the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea." CAL. PENAL CODE § 1192.5.

such a remedy might commend itself where a similar error is discovered early in the proceedings, Buckley has already testified for the state in the Fauber and Caldwell trials. He has nothing with which to bargain for a new plea. Most importantly, he has already served more than 15 years.

Accordingly, the only remedy that would give Buckley the benefit of his bargain is specific performance. *See Brown*, 337 F.3d at 1161-62 (where Brown had already served the agreed upon sentence, "Brown has met the terms of the agreed-upon bargain, and paid in a coin that the state cannot refund. Rescission of the contract is impossible under such circumstances; Brown cannot conceivably be returned to the status quo ante. That leaves specific performance as the only viable remedy."). Accordingly, I dissent, and would affirm the grant of habeas, to allow Buckley to remain at liberty.

FILED
DEC 6, 2002

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

BRIAN A. BUCKLEY,	)
	)
Petitioner,	)Case No. CV 00-2435-JSL (AJW)
v.	)
	)
C.A. TERHUNE,	) JUDGMENT
Director of the	)
California Department	)
of Corrections,	)
	)
Respondent.	)
	)

IT IS HEREBY ADJUDGED that the petition is granted. Respondent is directed to release petitioner from custody upon the expiration of petitioner's 15 year sentence, after taking into account any time credits earned by petitioner.

DATED: 12/6/02

/S/_____
J. SPENCER LETTS
United States District Judge

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

FILED
DEC 6, 2002

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

BRIAN A. BUCKLEY,	Case No. CV 00-2435-JSL(AJW)
Petitioner,	ORDER ADOPTING REPORT AND RECOMMENDATION
C.A. TERHUNE, Director of the California Department of Corrections,	OF MAGISTRATE JUDGE
Respondent.	

Pursuant to 28 U.S.C. § 636 (b) (1) (C), the Court has reviewed the entire record in this action, the attached Report and Recommendation of Magistrate Judge ("Report"), and the objections thereto. Good cause appearing, the Court concurs with and adopts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a de novo determination of the portions to which objections were directed.

IT IS SO ORDERED.

DATED: 12/6/02

J. SPENCER LETTS

FILED
OCT 8 2002

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

BRIAN A. BUCKLEY,	)	
	)	
Petitioner,	)	**CV NO. 00-2435-JSL-(AJW)**
v.	)	
	)	**REPORT AND**
C.A. TERHUNE, Director	)	**RECOMMENDATION OF**
of the California	)	**MAGISTRATE JUDGE**
Department of Corrections,	)	
	)	
Respondent.	)	
	)	

Facts[1/]

Thomas Urell was murdered on July 16, 1986. Shortly after the murder, petitioner was arrested based on some traffic tickets and was interviewed by the police about the murder. At the direction of Deputy District Attorney Donald Glynn,

1. The following summary of the facts is based on the state court records and on the evidence presented during the evidentiary hearing held in this Court on July 31, 2002, including the demeanor or the witnesses while testifying. To the extent that the evidence conflicts, this summary of the facts reflects the Court's resolution of those conflicts and constitutes the Court's findings of fact. See generally United States v. Ridgway, 300 F.3d 1153 (9th Cir. 2002).

petitioner was questioned "outside of Miranda," and was promised that his statements would not be used against him. [Transcript of Evidentiary Hearing held on July 31, 2002 ("EHT") 9-10, 46-47; Evidentiary Hearing Exhibit ("EH Ex.") D at 55-58]. Relying on those assurances, petitioner provided the police with a detailed statement about the murder, including his own role and the role of Curtis Fauber. After providing that information, petitioner was neither arrested nor charged with any crime related to the murder. Instead, he took care of his traffic tickets and was released. [EHT 26, 47]. Mr. Fauber, by contrast, was prosecuted for capital murder.

Petitioner was not arrested and charged with any crime related to his involvement in the Urell murder until more than a year later, when the case against Mr. Fauber ran into trouble after the trial court suppressed Mr. Fauber's confession. Suddenly, the prosecution needed petitioner's testimony to prove the charges against Mr. Fauber. [See EHT 10-14, 181-182 (Mr. Glynn's explanation that he needed petitioner as a witness because he was "struggling to put together the Fauber case"); EH Ex. S (statement of Deputy District Attorney Glynn at petitioner's December 18, 1996 parole hearing)].

On November 12, 1987, petitioner was arrested and charged with the first degree murder and robbery of Mr. Urell, and residential burglary. [EH Ex. B]. Before being charged with these offenses, petitioner, who had just turned 22 years old, had no criminal history other than traffic tickets. [EHT 49-50].

The preliminary hearing was held on December 14, 2002. [EH Ex. D]. The prosecution did not attempt to use petitioner's prior statements to the police against him. Instead, the prosecution relied on the testimony of Kristen McCarthy, a girlfriend to whom petitioner had confessed some involvement in the murder. [EH Ex. D at 74-90]. Petitioner's statements to Ms. McCarthy were admitted after the trial court rejected

petitioner's motion to suppress them. [EH Ex D at 55-72]. At the conclusion of the preliminary hearing, the trial court found the evidence against petitioner sufficient to warrant a trial. [Clerk's Transcript (CT) at 112].

The following day, Mr. Glynn, the prosecutor assigned to petitioner's case, sent petitioner's attorney, Willard Wiksell, a letter offering a plea bargain. The plea required that petitioner plead guilty to murder, and cooperated with the prosecution by testifying truthfully against Mr. Fauber and Christopher Caldwell regarding the participation in the murders of Mr. Urell and two others. [EH Ex. E; EHT 187-189]. In exchange, the prosecutor stated he would ask the court to declare the charge against petitioner to be second degree murder and to dismiss the charges of burglary and robbery. The letter said nothing about the sentence petitioner that would receive. [EH Ex. E; EHT 183-184, 191].

After receiving the letter from the District Attorney's office, Mr. Wiksell brought a copy of the letter to petitioner and discussed the plea offer with him. [EHT 52-53, 56]. Mr. Wiksell explained that if petitioner pleaded guilty, he would receive a 15 year sentence, and could be out in seven and one-half years if petitioner behaved himself in prison. [EHT 56-57, 77-112].[2/]

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2. Mr. Wiksell testified that he had no recollection of what he actually told petitioner about the sentence petitioner faced if he pleaded guilty to second degree murder. [EHT 127-134, 166]. Nor did Mr. Wiksell have any recollection of what happened at petitioner's change of plea hearing. [EHT 159-160, 163-164]. Instead, Mr. Wiksell testified about what his general practice would have been in circumstances such as those presented in petitioner's case, what he believed he would have advised petitioner given the circumstances, and his understanding of the sentence for the offense of second degree murder as of the time of the evidentiary hearing (rather than his understanding at the time he advised petitioner). [EHT 127-170]. Given Mr. Wiksell's lack of any specific recollection, and considering his demeanor while testifying, the Court gives little weight to Mr. Wiksell's testimony and finds it of little value in determining what actually petitioner was told regarding the sentence he would receive if he accepted the plea

Petitioner signed the letter on December 17, 1987. [EH Ex. E at 12; EHT 58-59]. On the same date, petitioner signed a form entitled "Felony Disposition Statement" that set forth the terms of the plea bargain. [EH Ex. H; EHT 59, 174]. Portions of the form had been filled out by Mr. Glynn, and when petitioner received it, there were little "x"s indicating where petitioner was supposed to place his initial. [EHT 61-62, 174-176; EH Ex. H].[3/]

In pertinent part, the Felony Disposition Form indicates that petitioner will change his plea to a plea of guilty to murder. It further states that

> My attorney has explained to me the direct and indirect consequences of this plea including the maximum possible sentence. I understand that the following consequences could result from my plea:
>
> **____ I could be sentenced to the state prison for a maximum possible term of 15 year(s).**
>
> **____ After I have served my prison term, I may be subject to a maximum parole period of life** (In re Carabes, 144 Cal.App.3d 927).
>
> **____ I will be ordered to pay a fine of not less than $100 nor more than $10,000 (Gov't Code § 13967).**

[EH Ex. H at 5-6]. Petitioner initialed these three statements regarding the consequences of his plea. [EH Ex. H at 6; EHT 62-63].[4/] He also initialed other parts of the form indicating

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offer.

3. Mr. Wiksell had no recollection of discussing the Felony Disposition Statement with petitioner. [EHT 149-151, 161]. Petitioner testified that the district attorney brought the form to him. [EHT 59].

4. Based upon the colloquy in court on January 4, 1988, it appears that the parole term of "life" may not have been written on the form at the

that he understood and waived his constitutional rights, and that his plea was entered into freely and voluntarily. [EH Ex. H at 5-6]. The form was returned to Mr. Glynn at some time prior to the January 4, 1988 change of plea hearing. [EHT 108-109, 176-177].

The second portion of the Felony Disposition Statement is entitled "The District Attorney's Position On Sentence" and "Summary of District Attorneys' Reason for Sentence." [EHT 66-67, 177; EH Ex. F at 7]. With respect to the "position on sentence", Mr. Glynn wrote in:

> At the time of sentencing the People will move the court to declare the murder to be murder in the second degree, with a maximum term of 15 years to life.

[EH Ex. H at 7]. Mr. Glynn had not filled out the second portion of the form before petitioner read, initialed, and signed the other portions of the form on December 7, 1987. [EHT 66-68, 114-115].[5/] Petitioner never saw or initialed the second

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time petitioner initialed it. [Reporter's Transcript of Proceedings January 4, 1988 ("RT") 5; EHT 202-203, 213]. The blank where that word appears probably was filled in during the change of plea hearing. [See RT 5].

5. Mr. Glynn testified that it was his "belief" that he filled it out this portion of the form before giving the form to Mr. Wiksell in December, 1987. [EHT 177, 195-197]. He admitted, however, that he did not initial this portion of the form until the January 4, 1988 hearing. [EHT 192-195]. At another point, he testified that he was "certain" that he filled out this portion of the form before giving it to Mr. Wiksell in December, 1987. [EHT 213]. On the other hand, Mr. Glynn repeatedly testified that he had no independent recollection of when he filled out any portion of the Felony Disposition Statement. [EHT 180, 191, 196]. Understandably, Mr. Glynn's testimony appears to be based upon his general practice rather than on any specific recollection of his actions in petitioner's case, which occurred more than 14 years earlier. [EHT 192-193]. Considering all the circumstances, including Mr. Glynn's demeanor while testifying, the Court finds his testimony that the second portion of the form was filled out and provided to petitioner before petitioner signed and initialed the form in December 1987 to unconvincing.

portion of the form. [EHT 115; EH Ex. H at 7-8].

Pursuant to the term of the plea bargain, petitioner was interviewed by Larry Troxel, a District Attorney's investigator, on December 21, 1987. [EHT 14-15, 70-71; EH Ex. F]. Mr. Troxel, who had been an investigator with the Ventura County District Attorney's Office for ten years at the time, was assigned to handle the investigation of the case against Mr. Fauber, as well as the case of petitioner. [EHT 6-7]. During the December 21, 1987 interview, or perhaps during another meeting where Mr. Glynn and petitioner were present, the plea bargain offered by the prosecution was discussed. Based upon those discussions, Mr. Troxel believed that petitioner would plead guilty to second degree murder and would receive a sentence of "15 years tops," so long as he testified truthfully against Mr. Fauber. [EHT 16.] His understanding was that petitioner would not be required to serve "any time beyond 15 years." [EHT 16]. In fact, there was some discussion to the effect that petitioner would "probably do less than the 15 years, perhaps half that time." [EHT 16-17]. It was not Mr. Troxel's understanding that petitioner's sentence would be 15 years to life in jail. [EHT 17]. Mr. Troxel conveyed his understanding of petitioner's sentence to petitioner's mother, Jynx Schoaf, during a conversation with her. [EHT 24]. Mr. Troxel made it clear that his understanding of petitioner's sentence was based upon his conversations with Mr. Glynn. [EHT 20, 24] Mr. Glynn testified that he had no doubt as to Mr. Troxel's integrity and believability. [EHT 211].

On January 4, 1988, before the change of plea hearing, petitioner met with Mr. Wiksell, Mr. Troxel, and Mr. Glynn in the holding cell outside of the courtroom. [EHT 72-73]. The four men discussed whether or not petitioner should plead guilty. Petitioner was reluctant to agree to the plea bargain because he feared violent retaliation by Mr. Fauber, Mr. Caldwell, or other inmates because of his cooperation with the prosecution. [EHT 57-58, 73-74; Memorandum in Support of

Petition, Ex. D (Declaration of Brian Buckley ("Buckley Decl.") at 32].[6] He was having second thoughts because the benefits of the deal did not seem worth the risk of physical harm. In particular, in evaluating the advantages and disadvantages of pleading guilty, petitioner compared what he believed his maximum sentence would be if he were convicted on the charges - 25 years - to the sentence he would receive if he pleaded guilty - 15 years.[7] [EHT 73]. Further, petitioner believed that, assuming good behavior, he would serve only half of either sentence so that the difference between the two sentences did not seem substantial. [EHT 73]. At that time, petitioner was told by either Mr. Glynn or Mr. Wiksell that he should focus on the 7 ½ years he would be serving if he accepted the plea offer. He was also told that he could get a degree in prison and start his own business after he was released, since he would still be a young man. [EHT 73-74].

Petitioner then went into the courtroom and changed his plea to guilty. It was on that date that both Mr. Glynn and Mr. Wiksell signed the Felony Disposition Statement. [EH Ex. H at 8; EH Ex. J].

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6. Petitioner's concerns apparently were well-funded. As the trial court stated during sentencing:

> The court finds and the Court requests that the clerk show on the Abstract and the Minutes that the Defendant's life is in danger in prison because of the testimony that he gave against his co-defendant in this case, and because of expected testimony in another murder case; and that the Court requests that the Department of Corrections give the Defendant protective custody status in state prison and seriously consider him as a candidate for out-of-state placement.

[RT 18].

7. Although petitioner used the phrase "25 years to life," he believed - akin to his understanding of the phrase "15 years to life" - that the phrase "25 years to life" meant a maximum of 25 years in prison, followed by the possibility of life on parole. [EHT 57, 84-85]. As explained in detail below, petitioner's understanding was the result of having initially been misinformed (twice) about his potential sentences.

In the course of the plea proceedings, the following colloquy transpired between Mr. Glynn and petitioner:

Q. All right, Mr. Buckley, I understand that today you're going to plead guilty to Count 1 of the Information CR23005; is that correct?

A. Yes.

Q. I'm going to read the count for you.

"The District Attorney of the County of Ventura accuses Brian Buckley of the crime of violation of section 187 of the Penal Code in that on or about July 16, 1986 in the County of Ventura, State of California, that you did wilfully, unlawfully and with malice aforethought murder Thomas Urell, a human being."

A. Yes.

Q. Now, I have here a felony Disposition Statement that I'm going to go over with you. There are several other charges on the information that will be dismissed at the time of sentencing; do you understand that?

A. Yes.

Q. And do you also understand that the murder will be declared by the Court to be second degree murder at the time of sentencing.

A. Yes.

Q. And this is contingent upon certain things that you will have to do in turn. But let

me get into the waiver of your rights. Are you entering into this plea voluntarily and not as the result of any pressure, force, threats or coercion brought against you or members of your family?

A. Yes.

Q. And have any commitments been made to you other than those shown in this Felony Disposition form and also in this letter dated December 15th that will be made a part of the Felony Disposition form?

A. Yes.

Q. No, I think you misunderstood my question. Do these two forms, the letter dated December 15th and the Felony Disposition form, this yellow form that you have signed -

A. Yes.

Q. - do these two forms contain all of the promises that have been made to you in this case?

A. Yes.

Q. Have you discussed the facts of the case with your attorney and discussed all the possible defenses that you might have to this case?

A. Yes.

Q. Now before a plea can be accepted the Court has to consider a document for proof of the factual basis for your plea. Do you agree

that the Court can consider the preliminary hearing transcript to make that determination?

A. Yes.

Q. And has your attorney explained all of the consequences of your plea to this charge?

A. Yes.

Q. Do you understand that for second degree murder you could be sentenced to state prison for a maximum possible term of 15 years?

A. Yes.

Q. And do you understand that after serving a prison term you'll be subject to a parole period - I'm sorry your Honor, does the Court know the parole period for second degree murder? I didn't enter that in the document.

THE COURT: Yes, it's - the possibility is parole for life.

Q. (BY MR. GLYNN:) All right. I've entered this into the document. You could be subject a parole period of life. And you could also be ordered to pay a fine of not less than a hundred dollars nor more than $10,000. Do you understand that?

A. Yes.

(Reporter's Transcript of Proceedings January 4, 1988 ("RT" 3-5) (emphasis added).

After petitioner waived his constitutional rights to a jury trial, to confront and cross-examine witnesses against him, and his right against self-incrimination [RT 5-61], Mr. Glynn continued:

> Q. Now as I stated before and it's also contained in this Felony Disposition form, that at the time of sentencing the people will ask the Court to declare the murder to be murder in the second degree **with a maximum term of 15 years to life.** And the People's reason for entering into that agreement are contained in this document that's attached to the Felony Disposition Statement.
>
> I'd like to go into the terms of this agreement with you. In order - or as part of the agreement you will agree to cooperate in the trials against Curtis Fauber and Christopher Cogwell [sic], and that you will testify in the Fauber case at all proceedings regarding the murder of Thomas Urell, David Church and Jack Dowdy, and testify truthfully regarding whatever you know about those murders. Do you understand the situation?
>
> A. Yes.
>
> Q. And do you agree that you will testify truthfully and cooperate in the proceedings?
>
> A. Yes.
>
> Q. And you also agree to testify against Curtis - I'm sorry, against Christopher Cogwell [sic] regarding the murder of David Church, and that would be both in trial and in a preliminary

hearing. Do you understand that to be the case?

A. Yes.

* * * * *

Q. At the end of the case against Curtis Fauber and at the end of the preliminary hearing against Christopher Cogwell [sic] you'll be sentenced at that time and the people will move that the Court declare the murder to be second degree and you'll be sentenced accordingly; do you understand that?

A. Yes.

* * * * *

Q. I'm showing you the Felony Disposition form, this yellow form here, that has some initials B.B. against a number of the paragraphs. Also has the initials D.C.G. which are my initials against some of the paragraphs. And at the end of the form I see the date December 17,1987 and your signature. Did you sign this document on that date?

A. Yes.

Q. And did you sign this document because you read each of the paragraphs that you have initialed and you understand what's contained in these paragraphs?

A. Yes.

[RT 6-8] (emphasis added).

The trial court then took petitioner's guilty plea and found that plea to be knowing and voluntary. [RT 8-9]. When setting the date for sentencing, the trial court informed the parties that he would be leaving the department at the end of January and asked counsel whether they wanted him to keep the case for sentencing or have a different judge sentence petitioner. [RT 12]. Mr. Wiksell responded, "normally wouldn't make any difference because it's a second degree murder and you can only sentence him to 15 to life. But given the little wrinkle of the federal prison[8] and the conversations that have gone by, I would prefer that the case remain with you, your Honor." [RT 12].

Petitioner performed his part of the plea bargain.

First, petitioner pleaded guilty to the charge of murder, relinquishing his constitutional rights, including his rights to a jury trial, to confront the evidence against him, and to require the State to prove the case against him beyond a reasonable doubt, and so on.

Second, petitioner ran the risk of retaliation and physical harm, a risk which the trial court took seriously.

Third, petitioner testified against Mr. Fauber on January 7, 1988. [EH Ex. K]. At the time, petitioner stated that he expected to receive a sentence of "15 years to life" in exchange for his guilty plea, so long as he testified truthfully. [EH Ex. K at 3305-3310]. There was no explanation of precisely what a term of "15 years to life" meant.

Fourth, petitioner testified during Mr. Caldwell's preliminary hearing on January 22, 1988. On that occasion,

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8. Petitioner had requested placement in a federal prison as a protective measure. [See RT 10-12].

petitioner testified that he had entered a plea bargain whereby he would testify against Messrs. Fauber and Caldwell in exchange for a reduction of his offense to second degree murder. [EH Ex. L at 25-26]. There was no discussion of the sentence petitioner would received.[9/]

Fifth, on February 9, 1988, petitioner testified during the penalty phase of Mr. Fauber's trial. [EH Ex. M]. On cross-examination, Mr. Fauber's attorney sought to impeach petitioner by showing that petitioner had received a "sweet deal" in exchange for his testimony against Mr. Fauber:

> Q. Mr. Buckley, you expect to be released from prison someday, don't you?
>
> A. Yes.
>
> Q. When do you think that's going to occur?
>
> MR. GLYNN: Objection. This isn't relevant.
>
> THE COURT: Overruled.
>
> THE WITNESS: Seven and a half years.
>
> BY MR. FARLEY [MR. FAUBER'S COUNSEL]:
>
> Q. Seven and half years.
>
> A. Yes.

[EH Ex. M at 4942; EHT 87-89]. Petitioner's answer, given

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9. At Mr. Caldwell's trial, petitioner refused to testify. He relied upon the Fifth Amendment, explaining that he did not want to testify because of his concerns regarding publicity. [EH Ex. P]. As a result, he was declared an unavailable witness, and his preliminary hearing testimony was admitted. [EH Exs. P & S].

under oath, reflected his understanding that he would receive a maximum sentence of 15 years in custody, pursuant to which - so long as he stayed out of trouble and worked in prison - he would be released in half of the maximum. [EHT 89-90].

Mr. Glynn, who heard petitioner testify that he expected to be released in 7 ½ years, understood petitioner's sentence differently. Mr. Glynn, however, never made any attempt to clarify, explain, or discuss petitioner's evident misapprehension about his sentence. [RT 202-209]. As Mr. Glynn explained

> [t]his single line of cross-examination about the seven and a half years probably surprised at the time, but it was not the sort of thing that was going to remain in my memory and be something that I would say, oh, gee, I have to take care of that as soon as a I have a spare moment. I was too busy with the other activities involved in the penalty phase for Fauber.

[EHT 215].

Petitioner was sentenced on March 1, 1988. Before the sentence was imposed, Mr. Glynn informed the trial court that petitioner had complied with his part of the plea bargain, and moved to have Count 1 declared to be second degree murder and to dismiss the remaining counts and special allegations. The motions were granted. [RT 13A-14]. The trial court then sentenced petitioner to "the term prescribed by law as 15 years to life." [RT 18]. No one voiced any objection to the sentence.

Based upon the advice petitioner received from Mr. Wiksell, the statements he initialed in the Felony Disposition Statement, the statements made by Mr. Glynn both on and off the record, and Mr. Glynn's failure to correct petitioner when petitioner explained his understanding of his sentence under oath, petitioner actually and reasonably believed that the

maximum time he would serve in prison was 15 years. [EHT 63, 69-70, 98-99]. At no point did anyone actually tell petitioner that he faced a sentence longer than 15 years. [EHT 78]. Accordingly, when the prosecutor or the trial court used the term "15 years to life," petitioner understood that phrase to refer to the sentence as it originally had been explained to him - namely, that he faced a maximum of 15 years in prison, after which, he would be on parole, possibly for the rest of his life. [EHT 63, 78-81, 92-93, 98-99]. There is no credible evidence that petitioner's counsel, the prosecutor, or the court - all of whom understood the correct meaning of the phrase "15 years to life" - actually told petitioner that the phrase meant something different than petitioner thought it did.

Petitioner's understanding was reasonable. Both Mr. Wiksell and Mr. Glynn testified that, standing alone, the part of the Felony Disposition Statement which stated that "I understand that I could be sentenced to the state prison for a maximum possible possible term of 15 years" reasonably could be understood as a determinate sentence of 15 years maximum. [EHT 157-158, 198-199].

Petitioner's testimony regarding his understanding of his sentence is corroborated by a letter he wrote to Judge McGrath before sentencing. In that letter, petitioner stated that he wished that he "wouldn't have to go to prison for 15 years to life," than stated "I realize I should go to prison, but 15 years even half with parroll [sic] is a lot of time for this." [EH Ex. N at 40-42]. Later in that letter, petitioner stated that he believed that he deserved less than 15 years. [EH Ex. N at 42; EHT 95-98]. As petitioner explained during the evidentiary hearing, when he wrote "15 years to life," he meant 15 years in prison, with the possibility that he could be released after 7 ½ years, followed by life on parole. [EHT 96-97].

In addition, on May 26, 1988, only a few months after being sentenced, petitioner wrote a second letter to Judge

McGrath. That letter also reflects his understanding of his sentence was a maximum 15 year term, and that he could be released after 7 ½ years. In petitioner's words:

> I'm writing this letter because I don't want to even take the stand against Chris Caldwell until I get a state appointed defender to look into my case and talk with me. I don't think it is right to give me a lawyer as incompetent as Wiksel [sic]. He's lied to me from the begining [sic]. When I took the deal I thought my first parol [sic] date is in ten years. I didn't even find out the truth till last month at CMC.

[EH Ex. Q at 1].

As petitioner explained during the evidentiary hearing, he wrote the second letter because Mr. Wiksell had told him that he would be eligible for release after 7 ½ years, but he subsequently learned from other inmates that due to the operation of "good time credits," he would not be eligible for release until after he had served 10 years of his sentence. [EHT 102-104].[10/] Although he had learned that he could not be released after a few as 7 ½ years, at the time he wrote this letter, petitioner still believed that he could not be required to serve any more than 15 years in prison. [EHT 103-104].

It was not until petitioner's documentation hearing before the parole board in 1993 and 1994 that he first learned that he was facing a maximum term of longer than 15 years. [EHT 104-105]. Petitioner did not believe the parole board

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10. California law allows prisoners to earn good time and work time credits to reduce the amount of time they must serve. Good time credits are earned for good behavior, and work time credits are earned for work performed. Cal. Penal Code §§ 2930, 2933. However, persons convicted of first or second degree murder may not received work time credits. Cal. Code Regs. Title 15 § 3043 (d) (1). In addition, a second degree murder conviction carries a minimum parole eligibility date of 10 years.

member who told petitioner that he was serving a life sentence, so petitioner hired an attorney to look into it. [EHT 105]. After confirming that petitioner's sentence was actually an indeterminate life sentence, the attorney filed a state habeas petition on petitioner's behalf. [EHT 105].

Procedural Issues

Before reaching the merits of the petition, the Court must consider respondent's arguments that the petition should be dismissed because it is untimely pursuant to 28 U.S.C. § 2244 (d) and because ground one of the petition is not exhausted.

1. The statute of limitation

The AEDPA amended section 2244 (d) to impose a one-year statute of limitations for the filing of habeas corpus petitions by state prisoners. 28 U.S.C. § 2244 (d).[11/] Section 2244 (d) provides:

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment because final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the

11. The statute of limitation set forth in section 2244 (d) was added by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Because this petition was filed after the enactment of the AEDPA, it is governed by those amendments. Fuller v. Roe, 182 F.3d 699, 702 (9th Cir. 1999) (per curiam).

> United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244 (d) (1) & (2)

Petitioner's conviction became final in 1989, 40 days after the California Court of Appeal affirmed his conviction on February 3, 1989. [See Motion to Dismiss, Ex. C]. See Rule 24 & 28(b) of the Cal. Rules of Court.[12/] Because petitioner's

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12. Petitioner explains that it was not until 1995, when he was provided with a "documentation hearing" in prison, that he learned that his sentence was not what he thought it was. [Motion to Dismiss, Ex. E at 69; Petition, Ex. D (Declaration of Brian A. Buckley)]. Petitioner then retained counsel to initiate a challenge to his plea. Petitioner's allegations regarding the discovery of his actual sentence during a 1995 prison hearing supports the conclusion that the one year period of limitation did not begin until his discovery of his claim. See 28 U.S.C. § 2244 (d) (1) (D). Nevertheless, petitoner is entitled to a later date based upon the one year "grace" period. See Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1286-1287 (9th Cir. 1997) (holding that the one-year statute of limitations did not begin to run against any petitioner until the AEDPA's effective date of April 24, 1996), cert. denied, 522 U.S. 1099 & 523 U.S. 1061 (1998), overruled on other grounds by Calderon v. United States District Court (Kelly), 163

conviction became final prior to the enactment of the AEDPA, the limitation period did not begin to run until April 24, 1996. Absent any tolling, petitioner had until April 24, 1997 within which to file his federal petition. See Patterson v. Stewart, 251 F.3d 1243, 1245-1246 (9th Cir. 2001.)

Petitioner filed three state applications for relief which tolled the limitation period. First, on May 13, 1996, approximately three weeks after the limitation period began running, petitioner filed a habeas petition in the Ventura County Superior Court. The petition was denied on September 10, 1996. [Motion to Dismiss, Ex. D].

Next, petitioner filed a habeas petition in the California Court of Appeal on December 22, 1997. [Motion to Dismiss, Ex. E]. The petition was denied on February 17, 1998. [Motion to Dismiss, Ex. F].

Petitioner proceeded to the California Supreme Court, filing a habeas petition on August 11, 1998. [Motion to Dismiss, Ex. G]. The California Supreme Court denied the petition on March 31, 1999, without citation to any procedural barrier. [Motion to Dismiss, Ex. H.] Petitioner then filed this federal habeas petition on March 7, 2000.[13/]

The limitation period is tolled "for all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), cert. denied, 529 U.S. 1104

F.3d 530, 540 (9th Cir. 1998) (en banc), cert. denied, 526 U.S. 1060 (1999).

13. Because petitioner is not proceeding pro se in this action, and was represented by counsel throughout his state collateral proceedings, he is not entitled to the benefit of the "mailbox rule," pursuant to which a pro se prisoner's pleading is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of court. See Houston v. Lack, 487 U.S. 266, 276 (1988) (describing the "mailbox rule" and its rationale).

(2000). As the Ninth Circuit explained, the word "pending" in section 2244 (d) (2) should be broadly construed, as it is in other federal habeas contexts. Nino, 183 F.3d at 1005-1006. Nino held that a properly filed application for state collateral review is "pending" within the meaning of section 2244 (d) (2) for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." Nino, 183 F.3d at 1006. Based on the facts presented in that case - a petitioner who filed state habeas petitions first in the Los Angeles County Superior Court, then in the California Court of Appeal, and finally in the California Supreme Court - the court concluded that the limitation period was tolled from the date on which the prisoner filed his first state habeas petition in the Superior Court until the date on which the California Supreme Court denied the petition. Nino, 183 F.3d at 1006.

In Carey v. Saffold, - U.S. -, 122 S.Ct. 2134 (2002), the Supreme Court endorsed the construction of the word "pending" that had been adopted in Nino. As the Supreme Court explained, the word "pending" covers the time between a lower court's decision and the filing of an original state habeas petition in a higher court. Carey, 122 S.Ct. at 2136-2142. Thus, the Court held that a state application is pending "as long as the ordinary state collateral review process is 'in continuance' - i.e., 'until the completion of' that process." Carey, 122 S.Ct. at 2138 (quoting Webster's Third New International Dictionary 1669 (1993)).

Pursuant to Carey and Nino, then, the limitation period was tolled for the entire period from the time petitioner filed his first state petition in the Superior Court until thirty days after the California Supreme Court denied his last habeas petition. See Corjasso v. Ayers, 278 F.3d 874, 879-880 (9th Cir. 2002) (stating that the California Supreme Court's denial of a habeas petition is not final until 30 days after the date of the denial and

adding the 30 days to period of Nino tolling); Bunney v. Mitchell, 262 f.3d 973, 974 (9th Cir. 2001) (per curiam) (same). Accordingly, the limitation period was tolled from May 13, 1996 (the date on which petitioner filed his first state petition in the California Superior Court) until April 30 1999 (30 days after the California Supreme Court denied his habeas petition). When petitioner filed his first state petition on May 13, 1996, 19 days had expired from the beginning of the limitation period. Thus, petitioner had 346 days of the one year limitation period remaining. Petitioner's federal petition, then, was due 346 days after April 30, 1999 - that is, no later than April 10, 2000. Petitioner filed this petition on March 7, 2000, and therefore the petition is timely.

Respondent argues that Nino should not apply to petitioner because petitioner was not "properly pursuing and exhausting his state remedies" during this entire period. In particular, respondent argues that petitioner waited too long in between each state court's denial of his petition and the filing of the next petition. [Motion to Dismiss at 6-10].[14/]

A California prisoner is not entitled to tolling under section 2244 (d) (2) if he delayed "unreasonably" in seeking further review of his petition. Carey, 122 S.Ct. at 2139-2141, Petitioner, however, did not delay unreasonably in seeking review by higher state courts. Although a one year delay might sometimes be considered "unreasonable," petitioner has provided a detailed account of the reasons of his delay. As petitioner's counsel explains, petitioner's delay was due to difficulties encountered in attempting to obtain evidence to support his claim. At least some of the delay was attributable to the prosecutor's refusal to provide petitioner with relevant records, and the fact that petitioner's trial counsel had lost or

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14. Petitioner waited a little more than one year after the Superior Court's denial of his first state petition before filing his second state petition in the California Court of Appeal. Petitioner also waited several months after the California Court of Appeal's denial of his second state petition before filing his third state petition in the California Supreme Court.

destroyed relevant records. [Response to Motion to Dismiss at 3]. Cf Ford v. Hubbard, ___F.3d ___, 2002 WL 31001146, *8 (9th Cir. 2002) (noting that "lack of access to one's legal papers may constitute an 'extraordinary circumstance' that would warrant equitable tolling in instances in which the state is responsible for the unavailability."), citing Whalem/Hunt v. Early, 233 F.3d 1146, 1146 (9th Cir. 2000) (en banc). More importantly, petitioner's counsel points out that the reasons for the delay were explained to the state court under penalty of perjury, and that no state court denied any petition on the ground of undue delay or untimeliness. Instead, the California Superior Court addressed the merits of petitioner's claims without reference to any procedural deficiency. Both the California Court of Appeal and the California Supreme Court subsequently denied petitioner's petitions without explanation or citation. [See Response to Motion to Dismiss at 3; Motion to Dismiss, Exs. D-H]. The higher courts' "silent" denials of petitioner's habeas petitions indicate that both courts considered and rejected petitioner's claims on the merits.[15/] See Ylst v. Nunnemker, 501 U.S. 797, 803-806 (1991) (explaining that federal courts "look through" unexplained state orders denying habeas petitions to the last reasoned decision by state court and presume that the higher court denied the claims for the same reason as the lower court); Harris v. Superior Court, 500 F.2d 1124, 1128-1129 (9th Cir. 1974) (en banc) (holding that where the state court rejects a claim without citation to authority, this indicates that it is considered and rejected the claim on the merits); Hunter v. Aispuro, 982 F.3d 344, 347-348 (9th Cir. 1992) (continuing to treat postcard denials as denials on the merits after Coleman v. Thompson, 501 U.S. 722 (1991)), cert. denied, 510 U.S. 887 (1993); cf. Carey, 122 S.Ct. at 2140-2141 (remanding case for determination whether petitioner "unreasonably" delayed where petitioner waited four and one half months between lower court's denial of habeas petition and

15. Respondent separately agrees. In both his return and his post-evidentiary hearing brief, respondent argues that the California Supreme Court's decision rests on the same grounds as the California Superior Court. [Return at 9-10; Respondent's Post Evidentiary Brief at 13-14].

filing of petition in California Supreme Court and where California Supreme court stated that the petition was denied "on the merits and for lack of diligence;" noting that if the California Supreme Court had clearly ruled that the petitioner's delay was "unreasonable," "that would be the end of the matter, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits"; and recognizing that special circumstances my warrant the conclusion that the petition was not unreasonably delayed).

2. Exhaustion

Respondent argues that petitioner has not exhausted his state remedies as to ground one of the petition.

The AEDPA provides that

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.

28 U.S.C. § 2254 (B) (1) (a). The exhaustion requirement is satisfied when the substance of a petitioner's federal claim has been fairly presented to the state's highest court. See Castille v. Peoples, 489 U.S. 346, 350 (1989); Kelly v. Small, 300 F.3d 1159, 1161 (9th Cir. 2002); Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000), amended 247 F.3d 904 (2001). Fair presentation requires that a petitioner alert the state court that his claim is based on federal law. Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam). As the Supreme Court has held, a habeas claim must "include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." Gray v. Netherland, 518 U.S. 152, 162-163 (1996); see Hiivala v. Wood, 195 F3d 1098, 1106

(9th Cir. 1999), cert. denied, 529 U.S. 1009 (2000). Indeed, the Ninth Circuit recently reiterated that "a petitioner must characterize [his] claims 'specifically as federal claims.'" Kelly, 300 F.3d at 1165, citing Lyons, 232 F.3d at 670 ("the petitioner must have either referenced specific provisions of the federal constitution or statutes or cited to federal case law") (emphasis in original). With these requirements in mind, the Court compares the claims raised in the California Supreme Court with ground one of the federal petition.

In ground one of the federal petition, petitioner alleges that his guilty plea "was invalid under the Due Process Clause of the United States Constitution" because petitioner did not understand the sentence he would receive. In support of his claim, petitioner cites Santobello v. New York, 404 U.S. 257, 261 (1981) and Mabry v. Johnson, 467 U.S. 504, 508 (1983), and argues that he reasonably believed that he was entering a plea bargain pursuant to which he would received a determinate sentence of 15 years in prison, followed by a parole term of life, and that his belief was the result of statements made by the prosecutor and the trial court, and as well as his own attorney's failure to clarify those statements. [See Memorandum in Support of Petition at 7-14].

In his petition filed in the California Supreme Court, petitioner alleged that he was led to believe that he would receive a fifteen year sentence followed by parole for life in exchange for his guilty plea. The petition relied on Santobello and Mabry, and argued that his attorney was ineffective for failing to clarify the sentence, the trial court failed to resolve the ambiguity in the plea agreement, and the prosecutor's statements regarding the plea bargain infected the proceedings with fundamental unfairness. [Motion to Dismiss, Ex. G].

Although organized differently, petitioner presented the same factual allegations and the same federal legal grounds to the California Supreme Court that he presents in his federal

petition. See Chacon v. Wood, 36 F.3d 1459, 1467 (9th Cir. 1994) ("A habeas petitioner may, however, reformulate somewhat his claims made in state court; exhaustion requires only that the substance of the federal claim be fairly presented.") (emphasis in original), superseded by statute on other grounds as recognized by Morris v. Woodford, 229 F.3d 775, 779 (9th Cir. 2000), quoting Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). Accordingly, petitioner claim alleged in ground one of the petition is exhausted.

The merits

Petitioner alleges that his plea was constitutionally invalid because (1) based upon the prosecutor's misrepresentations, petitioner believed that he would receive a determinant sentence of 15 years followed by parole for life but, in fact, petitioner was sentenced to an indeterminate term of 15 years to life; (2) petitioner was not aware of the consequences of his plea; and (3) petitioner received ineffective assistance of counsel because his attorney failed to properly advise petitioner of the terms of his plea. [Petition at 6-7; Memorandum in Support of Petition at 7-19].

Standard of Review

A federal court may not grant a writ of habeas corpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254 (d); see Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000).

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-413 (2000); see Weighall v. Middle, 215 F.3d 1058, 1061 (9th Cir. 2000) (discussing Williams).

A federal court making the "unreasonable application" inquiry asks "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409; Weighall, 215 F.3d at 1062. An unreasonable application of federal law is different from an incorrect application of federal law. That is, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 411; see also Baker v. City of Blaine, 221 F.3d 1108, 1111, (9th Cir. 2000) (holding that in order for a state court's application of federal law to be unreasonable, it must have been clearly erroneous); Gunn v. Ignacio, 263 /f.3d 965, 969-[illegible] (9th Cir. 2001) ("clearly erroneous" standard applies to determination whether state court decision on breach of plea agreement was an unreasonable application of federal law under 28 U.S.C. § 2254 (d) (1) or an unreasonable determination of the facts under 28 U.S.C. (d) (2)) Van Tran v. Lindsey, 212 F.3d 1143, 1152-1154 (9th Cir. 2000)

(same), cert. denied, 531 U.S. 944 (2000).

Further, under the AEDPA, this Court "can no longer reverse a state court decision merely because that decision conflicts with Ninth Circuit precedent on a federal Constitutional issue." Duhaime, 200 F.3d at 600. Nevertheless, Ninth Circuit case law is relevant because it "may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help . . . determine what law is 'clearly established.'" Van Tran, 212 F.3d at 1154, quoting Duhaime, 200 F,3d at 600-601; see also O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998) (holding that "to the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness vel non of the state court's treatment of the contested issue").

Finally, state court findings of fact are presumed to be correct unless petitioner rebuts that presumption by clear and convincing evidence, 28 U.S.C. § 2254 (e) (1).

1. The terms of petitioner's plea agreement were breached

If the government obtains a guilty plea predicated in any significant degree on a promise by the prosecuting attorney, then that promise must be performed. See Mabry v. Johnson, 467 U.S. 504, 509 (1984); Santobello v. New York, 404 U.S. 257, 262 (1971) (a promise that in any degree induces a plea "must be fulfilled"); Gunn, 263 F.3d at 969-970; United States v. Anderson, 970 F.2d 602, 607 (9th Cir. 1992), amended on other grounds, 990 F.2d 1163 (9th Cir. 1993); United States v. Travis, 735 F.2d 1129, 1132 (9th Cir. 1984); see also United States v. Peglera, 33 F.3d 412, 414 (4th Cir. 1994) ("Because a government that lives up to its commitments is the essence of liberty under law, the harm generated by allowing the government to forego its plea bargain obligations is one which

cannot be tolerated."). "[W]hen the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." Mabry, 467 U.S. at 509.

"Plea agreements are contractual in nature and are measured by contract law standards." United States v. Keller, 902 F.2d 1391, 1393 (9th Cir. 1990) (citation omitted). In construing an agreement, the court must determine what a defendant reasonably understood at the time he entered his plea. Gunn, 263 F.3d at 970 (based on a plea agreement, a Nevada state petitioner reasonably understood that his sentences would run concurrently rather than consecutively); United States v. Keller, 902 F.2d 1391, 1393 (9th Cir. 1990) (citation omitted). In construing an agreement, the court must determine what a defendant reasonably understood at the time he entered his plea. Gunn, 263 F.3d at 970 (based on a plea agreement, a Nevada state petitioner reasonably understood that his sentences would run concurrently rather than consecutively); United States v. Packwood, 848 F.2d 1009, 1011 (9th Cir. 1988); United States v. Quan, 789 F.2d 711, 713 (9th Cir. 1986); United States v. Rockwell Int'l Corp., 124 F.3d 1194, 1199 (10th Cir. 1997), cert. denied, 523 U.S. 1093 (1998). Given the contractual nature of plea offers, where the government drafts the plea offer, all ambiguities are to be resolved in favor of the defendant. United States v. Blaylock, 20 F.3d 1458, 1468 (9th Cir. 1994); United States v. De La Fuente, 8 F.3d 1333, 1338 (9th Cir. 1993).

This Court must determine what petitioner reasonably understood to be the terms of the agreement when he entered the plea. See De La Fuente , 8 F.3d at 1337; United States v. Gerace, 997 F.2d 1293, 1294 (9th Cir. 1993); Quan, 789 F.2d at 713. That determination is a question of fact, Quan, 789 F.2d at 714, and a state court's findings on the issue generally are entitled to a presumption of correctness under 28 U.S.C. § 2254 (e) (1). Packwood, 848 F.2d at 1011.

In petitioner's case, the last reasoned opinion of a state court is the one paragraph order of the California Superior Court, which states:

> . . . with the exception of one statement in the negotiated disposition statement, and a reference at the time of the taking of the plea on January 4, 1988, the records demonstrate that the advisement was that the sentence would be 15 years to life as provided by law, and that the petitioner well knew this. Specifically, in the felony disposition statement, the maximum term of 15 years to life is expressly set forth. During the taking of the plea on January 4, 1988, petitioner was expressly advised that the maximum term of imprisonment was 15 years to life. Again, his counsel recited that the only sentence available was 15 years to life. Any ambiguity concerning petitioner's understanding of the sentence he was to receive is put to rest by petitioner's own statement found in the transcript of January 7, 1988 during petitioner's testimony at the trial of Curtis Fauber that he understood his term of imprisonment would be 15 years to life. This is underscored by the judge's comments at the time the sentence was pronounced on March 1, 1988 . . . wherein . . . the court expressly states what the term of imprisonment was to be, to wit, 15 years to life.

[Motion to Dismiss, Ex. F at 50 (citations to exhibits omitted)].

The Superior Court's findings and conclusion rest on a flawed foundation. It lacked the benefit of an evidentiary hearing during which it could have developed the record regarding any discussions or advice which occurred off the record. Understandably, its ruling was based largely on recitations of the term "15 years to life" found in the record, and

failed to give adequate consideration to what that legal term actually and reasonably meant to petitioner - a 22 year old with little or no previous contact with the criminal justice system - in the context of what he had already been told. In particular, the Superior Court brushed aside the evidence that petitioner repeatedly had been told - before the use of the phrase "15 years to life" - that he would be sentenced to a maximum term of 15 years in prison and to a parole term of life. Thus, regardless of how trained attorneys or judges understand the term "15 years to life," petitioner was encouraged to, and actually and reasonably did, understand it differently.[16/] In a sense, the Superior Court made the same mistake that the attorneys and the court made at the time of petitioner's change of plea and sentencing: that is, they assumed that a legal term whose meaning was well-known to them was understood in the same way by petitioner. For these reasons, to the extent that the state court's ruling is properly characterized as a factual finding, it is an incorrect and unreasonable one, and petitioner has met his burden of demonstrating by clear and convincing evidence that it is erroneous. See 28 U.S.C. § 2254 (e) (1).

There is no dispute that petitioner was told, both in writing (in the Felony Disposition Statement which was prepared by Mr. Glynn) and orally (by Mr. Glynn during the change of plea hearing), that in exchange for his guilty plea, he would receive a maximum sentence of 15 years. (EH Exs. H & J). He also was told that after serving that prison term, he might serve a parole term of life. Petitioner was then told by the same prosecutor that he was receiving a term of "15 years to life." Further, either Mr. Wiksell or Mr. Glynn informed petitioner that he could be out in as little as 7 ½ years. As petitioner credibly testified, and as he has consistently and openly maintained both before and after his sentencing, he understood that he was receiving a sentence of no more than 15 years in

16. The Court's conclusion is necessarily based upon the particular circumstances surround the advice provided and representations made to petitioner. The extent to which the term "15 years to life" might be ambiguous or imprecise in other circumstances is not addressed.

prison. Petitioner's understanding was reasonable. The evidence demonstrates that before petitioner pleaded guilty, he was never unambiguously informed - whether by Mr. Wiksell, Mr. Glynn, or the trial court - in language that a layperson could be expected to understand, that he would be subjected to what actually happened to him - an indeterminate life sentence, with parole eligibility after serving a minimum of 10 years. Based upon all of the evidence, it was objectively reasonable for petitioner, who was not trained in the law and who had no previous experience with the criminal justice system or expert knowledge of California's sentencing laws, to believe that a sentence of "15 years to life," meant a maximum prison sentence of 15 years, followed by the possibility of parole for life.[17]

This is true regardless of whether the prosecutor intended to mislead petitioner regarding his sentence. As the record reflects, and as Mr. Glynn conceded, he explained to petitioner that in exchange for his cooperation and guilty plea, petitioner could be sentenced to a maximum prison term of 15 years. Although Mr. Glynn subsequently used the term "15 years to life" in describing petitioner's sentence, by the time that petitioner testified during the guilt phase of Mr. Fauber's trial, which was before petitioner was sentenced, Mr. Glynn knew that petitioner believed that his sentence would allow him to be released after just 7 ½ years if he behaved himself. Thus, the prosecutor allowed petitioner to go forward with sentencing knowing that the sentence which petitioner believed he had agreed to differed significantly from the sentence which petitioner actually would be required to serve. Whether the prosecutor actively misled petitioner, or more likely, simply knowingly allowed petitioner to proceed on the basis of a misapprehension regarding the sentence he would receive, the prosecution must fulfill petitioner's reasonable understanding

17. Further, although not conclusive on the issue, the reasonableness of petitioner's understanding is supported by the fact that Mr. Troxel, and experienced investigator working closely with Mr. Glynn on petitioner's case, also understood petitioner's sentence this way.

of the plea agreement. See United States v. Hallam, 472 F.2d 168, 169 (9th Cir. 1973) ("It is clear from Santobello v. New York that due respect for the integrity of plea bargains demands that once a defendant has carried out his part of the bargain the Government must fulfill its part."); United States v. Ingram, 979 F.2d 1179, 1184 (7th Cir. 1992) ("The government must fulfill any promise that it expressly or impliedly makes in exchange for a defendant' guilty plea."), cert. denied, 507 U.S. 997 (1993); see also Blaylock, 20 F.3d at 1468 (noting that any all ambiguities in plea agreement are to be resolved in favor of the defendant).[18]

In light of the foregoing, the state court's rejection of petitioner's claim is both contrary to clearly established federal law as set forth in Santobello, 404 U.S. at 263, and based upon an unreasonable or clearly erroneous determination of the facts. See 28 U.S. § 2254 (d). See Gunn, 263 F.3d at 969.[19]

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18. Indeed, the fact that the government's promise is either unfulfillable or contrary to the law does not enable the government to rescind the agreement, especially after the defendant has fulfilled his part of the bargain. See Anderson, 970 F.2d at 607 (stating "nor does the government's present inability to fulfill its promise mean that it did not breach the plea agreement."), citing United States v. Cook, 668 F.2d 317, 320 (7th Cir. 1982). As explained by the Seventh Circuit, "(a) plea induced by an unfulfillable promise is no less subject to challenge than one induced by a valid promise which the Government simply fails to fulfill." Cook, 668 F.2d at 320, citing Brady v. United States, 397 U.S. 742, 755 (1970); see also Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 296 (2d Cir. 1976) (holding that "where a defendant relies on promises by the prosecutor which are in fact unfulfillable, he has a right to have those promises fulfilled."); United States ex rel. Ferris v. Finbeinger, 551 F.2d 185, 186-187 (7th Cir. 1977) (holding that fundamental fairness required limiting sentence to agreed-upon term even though it resulted in a sentence not authorized under state law), cert. denied, 435 U.S. 932 (1978); Correale v. Unted States, 479 F.2d 944, 947-950 (1st Cir. 1973) (concluding that the only just remedy was enforcement of the promise made by the prosecutor even though it resulted in an illegal sentence).

19. As the Ninth Circuit explained in Gunn,

> It can be difficult to classify an analysis as an "unreasonable application" of federal law as determined

Accordingly, petitioner is entitled to relief. See Gunn, 263 F.3d at 969, 971-972 (granting habeas relief based upon Santobello, and noting that the government's obligation to fulfill a plea bargain is "clearly established Federal law" within the meaning of the AEDPA).

2. The appropriate remedy

A district court has discretion in determining what remedy is appropriate for breach of a plea agreement. Anderson, 970 F.2d at 608; United States v. Boatner, 966 F.2d F.2d 1575, 1580 (11th Cir. 1992). The Court may order specific performance, or it may grant petitioner the option of withdrawing his plea and repleading or proceeding to trial. Santobello, 404 U.S. at 263; Anderson, 970 F.2d at 608 & n. 8. In this case, however, merely allowing petitioner to withdraw his plea is not a viable form of relief. Carter v. McCarthy, 806 F.2d 1373, 1377 (9th Cir. 1986) (holding that specific performance of a broken plea agreement was the only remedy because petitioner already had served a sentence in excess of the one he had bargained for and leave to withdraw his plea would have been of no benefit to him), cert. denied, 484 U.S. 870 (1987); Hallam, 472 F.2d at 169 (stating that Santobello "demands that once a defendant has carried out his part of the bargain the Government must fulfill its part."). Not only has petitioner served all, or nearly all, of the prison term for which he bargained, he also has placed himself at risk by testifying on behalf of the prosecution against Messers. Fauber and Caldwell. The prosecution received the benefits of its bargain, benefits

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> by the Supreme Court, or alternatively as an "unreasonable determination of the facts" bearing out that application. But because we use the same deferential "clearly erroneous" standard for both determination, "if we are wrong" in this classification, sometimes "it makes no difference."

Gunn, 263 F.3d at 969, quoting Torres v. Prunty, 223 F.3d 1103, 1107 (9th Cir. 2000).

which cannot be restored to petitioner if his plea was to be rescinded. Accordingly, the appropriate remedy is specific performance. See Carter, 806 F.2d at 1377; Boatner, 966 F.2d at 1580; United States ex rel. Ferris v. Finbeinger, 551 F.2d 185, 186 (7th Cir 1977); Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 297 (2d Cir. 1976). There being no other adequate remedy, petitioner is entitled to immediate release no later than the expiration of his 15 year term.[20/] Although the Court cannot determine the precise date, it appears that petitioner's sentence will expire in the very near future, if it has not already done so.[21/]

The final question is whether petitioner remains subject to a term of parole, and if so, what that term may be. The parties have not addressed this issue. Petitioner believed at the time of his change of plea that in addition to a maximum term of 15 years in custody, he faced the possibility of parole for life. Because petitioner has now served all, or nearly all, of his custodial sentence, however, whether petitioner may be placed on parole, and if so, for how long a period, is unclear. Under these circumstances, the Court merely notes that a parole term of some duration may be imposed upon petitioner's release from custody, if authorized by state law.

3. Petitioner's other claims

Because petitioner is entitled to relief on the basis of this claim, a determination of petitioner's remaining claims is not necessary. See Robbins v. Smith, 158 F.3d 1062, 1068-1069

20. Petitioner may in fact be entitled to be released before the 15 year anniversary of his sentencing because he may be owed presentence and other credits. The parties have not addressed this issue, and the record lacks sufficient information to enable the Court to make this determination.

21. The minute order of petitioner's sentencing in Superior Court, on March 1, 1998, provides 110 actual days of jail credit, and 55 days credit under California Penal Code § 4019 (b) (providing, inter alia credit for work release and good behavior), for a total of 165 days. (CT at 14) The Abstract of Judgment committing petitioner to state prison indicates credit of 110 days for time served. [CT 16].

(9th Cir. 1997), rev'd on other grounds, 528 U.S. 259 (2000); Rice v. Wood, 44 F.3d 1396, 1402 n. 10 (9th Cir. 1995), vacated in part on other grounds, 77 F.3d 1138 (9th Cir.) (en banc), cert. denied, 519 U.S. 873 (1996); Blazak v. Ricketts, 971 F.2d 1408, 1413-1414 (9th Cir. 1992) (per curiam). Even if petitioner prevailed on one or more of his other claims, he could obtain no greater relief than that to which he already is entitled.

Conclusion

It is recommended that judgment be entered granting the petition and directing respondent to release petitioner from custody upon the expiration of petitioner's 15 year sentence, after taking into account any time credits earned by petitioner.

Dated: 10.4.02

(SGD.) ANDREW J. WISTRICH
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: CV 00-2435-JSL(AJW) Date: July 31, 2002

Title: BRIAN A. BUCKLEY vs. C.A. TERHUNE, WARDEN

PRESENT: ANDREW J. WISTRICH, UNITED STATES MAGISTRATE JUDGE

Attorneys For Petitioner:	Attorney for Respondent:
Alan Bloom	Noah Hill

PROCEEDINGS: EVIDENTIARY HEARING

Case called. Counsel make their appearances; petitioner is present in custody.

Counsel stipulate and the court orders exhibits A through S admitted into evidence. Witnesses called, sworn and testify.

Counsel shall file and serve simultaneous briefs by August 23, 2002. If either counsel determine a need for oral argument, they should contact the clerk to schedule a hearing.

A transcript shall be prepared and shall be delivered to the Clerk in accordance with 28 U.S.C., §753(f) and 18 U.S.C. §3006(a) for the use of the Court, and if such transcript is to be furnished and provided by a salaried court reporter, no fees shall be payable.

IT IS SO ORDERED.

cc: Parties **FILED: AUG -5 2002**
Walter Ledge

MINUTES FORM II Initials
of Deputy Clerk
CIVIL -GEN

FILED
MAR 31 1999

S072579

IN THE SUPREME COURT OF CALIFORNIA

IN RE BRIAN BUCKLEY

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

(SGD.) Chief Justice

* * * * * * * * * * * * * * * FILE COPY * * * * * * * * * * * * *

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 6 DATE: 02/17/98

Allen R. Bloom
1551 Fourth Ave.
Suite 801
San Diego, CA. 92101 2156

RE: Buckley, Brian A.
VS.
In re Buckley On Habeas Corpus
2 Criminal B118049
Ventura No. CR23005

THE COURT:

The Petition for writ of Habeas Corpus is denied.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

JUDGE: STEVEN Z. PERREN DATE: September 10, 1996

TIME: _____

CLERK: KAREN VALDEZ BAILIFF: ALFONSO LONGOBARDI CASE NO: CR23005

TYPE OF CASE:

In the Matter of

BRIAN BUCKLEY

on Habeas Corpus

NATURE OF PROCEEDINGS: ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The court has reviewed, read and considered the Petition for Writ of Habeas Corpus filed by petitioner on May 13, 1996, including the Exhibits 1-5 inclusive, the Return to the Petition filed by the District Attorney on July 12, 1996, and the Traverse to the Return dated August 21,1996.

The court finds that with the exception of one statement the negotiated disposition statement (petitioner's Exhibit 3), and a reference at the time of the taking of the plea on January 4, 1988, page 5, lines 5-7 of petitioner's Exhibit 4, the records demonstrate that the advisement was that the sentence would be 15 years to life as provided by law, and that the petitioner well knew this. Specifically, in the felony disposition statement (petitioner's Exhibit 3) at page 4 thereof, the maximum term of 15 years to life is expressly set forth. During the taking of the plea on January 4, 1988, (petitioner's

Exhibit 4), petitioner was expressly advised that the maximum term of imprisonment was 15 years to life. Again, at page 12, lines 9-14, his counsel recited that the only sentence available was 15 years to life. Any ambiguity concerning petitioner's understanding of the sentence he was to receive is put to rest by petitioner's own statement found in the transcript of January 7, 1988, during petitioner's testimony at the trial of Curtis Fauber that he understood his term of imprisonment would be 15 years to life (page 2, line 18 through page 3, line 9).[1/] This is underscored by the judge's comments at the time the sentence was pronounced on March 1, 1988 (petitioner's Exhibit 5 as augmented by the mailing of July 29, 1996) and page 18 thereof wherein at lines 2-5 the court expressly states what the term of imprisonment was to be, to wit, 15 years to life.

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1. The court also takes judicial notice of its pleadings, records and files and notes that on April 6, 1986, petitioner personally submitted a "Petition for Writ of Appeal" in which he states, "The date of the judgment. order or decree for confinement and its terms: (in petitioner's hand) March 1, 1988. 15 years to life, pleas bargain." A copy of the entire document is attached as Court's Exhibit 1 to these proceedings, inasmuch as neither counsel have referred to the document.

CASE NUMBER: CR23005 DATE: SEPTEMBER 10, 1996
PAGE NO: TWO

TITLE OF CASE: IN THE MATTER OF BRIAN BUCKLEY ON HABEAS CORPUS

Based upon the record provided by counsel in the within matter, it is evident that petitioner well knew that the term of imprisonment for which he was to be committed to prison for the crime of second degree murder was 15 years to life. In re Mosher, (1993) 6 Cal.4th 342, 354-355, citing United States vs. Timmreck (1979) 441 US 780, 784.

The petition is denied.

The clerk shall give notice of this order to counsel for petitioner and counsel for respondent.

Dated: September 10, 1996.

(SGD.) HONORABLE STEVEN Z. PERREN
Judge of the Superior Court

SHEILA GONZALEZ, Superior Court
Executive Officer and Clerk

By: (SGD.) Deputy Clerk

CC-180(REV.1-83) **MINUTES**

SUPERIOR COURT OF CALIFORNIA, COUNTY OF VENTURA

JUDGE: STEVEN Z. PERREN DATE: July 22, 1996 TIME:

CLERK: SYLVIA GONZALES BAILIFF: _____

CASE NO.: CR-23005

TYPE OF CASE:

In re the Matter of the Application of:

BRIAN A. BUCKLEY
for Writ of Habeas Corpus

NATURE OF PROCEEDINGS: ORDER TO FILE TRAVERSE

The court having received the return to the petition for Writ of Habeas Corpus filed by petitioner Brian A. Buckley herein, now orders and directs said petitioner to file his Traverse (P.C. §1484) to said return. The court is specifically concerned with the factual allegations set forth in paragraph 12, paragraph 13 and paragraph 14, wherein it appears that petitioner was well aware at the time of the entry of his plea to 2nd degree murder that the punishment therefore was 15 years to life. The court also respectfully requests that petitioner furnish the court with missing page 18 of Exhibit 5 of petitioner's moving documents. Said traverse is to be served and filed with this court on or before Friday, August 23, 1996. Following receipt of said traverse, the court will either summarily rule based upon the pleadings or set a hearing on the petition.

The clerk is directed to give notice.

DATED: July 22, 1996 (SGD.) STEVEN Z. PERREN
Judge of the Superior Court

SHEILA GONZALEZ, Superior Court
Executive Officer and Clerk (SGD.) By Deputy Clerk
CC-180 (REV. 1-83) **MINUTES**

FILED
JUL 15 1996

MICHAEL D. BRADBURY
District Attorney
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Deputy District Attorney
800 S. Victoria Avenue
Ventura, CA 93009

Telephone (805) 654-3070

Attorney for Respondent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA

In the Matter of the Application of	) COURT No. CR-23005
	)
	) **ADDENDUM TO**
BRIAN A. BUCKLEY	) **RETURN TO**
	) **PETITION FOR**
	) **WRIT OF HABEAS**
for Writ of Habeas Corpus	) **CORPUS**
_____	)

DECLARATION OF DONALD C. GLYNN

I, Donald C. Glynn, declare:

I am a deputy district attorney assigned to the Major Crimes Unit of the Ventura County District Attorney's Office. In 1986, in my position of Major Crimes Attorney, I was assigned prosecution of the cases People v. Brian Buckley, CR-23005, People v. Curtis Fauber, CR-21927, and People v. Christopher Caldwell, CR-23139.

During prosecution of those cases, Brian Buckley was offered a deal that if he pled guilty to the murder of Thomas Urell, and testified as a witness in the trials against Fauber and Caldwell, then at sentencing, the murder charge would be declared to be murder of the second-degree.

At no time during the negotiations with Brian Buckley or his attorney, or at any time after the negotiations, were any promises made that the sentence for second-degree murder would be anything other than 15 years to life.

Buckley accepted the deal on December 17, 1987, and on January 4, 1988, I took his plea to one count of murder. On January 7, 1988 I called Buckley as a witness in the trial of People v. Curtis Fauber. At the very beginning of Buckley's testimony in that case, I asked Buckley to explain his deal and to describe the difference between the penalties for first and second-degree murder. Buckley described the difference as being "25 years to life" for first-degree murder, and "15 years to life" for second-degree murder. (Please see Exhibit A, pp. 2-3.)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on July 15, 1996 at Ventura, California.

/s/
DONALD C. GLYNN
Deputy District Attorney

DCG:eb
Glynn.D2B

VENTURA, CALIFORNIA; THURSDAY,
JANUARY 7, 1988
A.M. SESSION

--- o0o ---

(Proceedings previous to this point are not transcribed herein.)

MR. GLYNN: The People call Brian Buckley.

Mr. Buckley, would you come forward and be sworn in, please.

THE CLERK: Right there is fine, sir. If you'd raise your right hand.

BRIAN ANDREW BUCKLEY,
called as a witness by the People, having been
first duly sworn, was examined and
testified as follows:

THE WITNESS: Yes, I do.

THE CLERK: Thank you. You may be seated on the witness stand. Please state your full name and spell your name for the record.

THE WITNESS: Brian Andrew Buckley. B-r-i-a-n, A-n-d-r-e-w, B-u-c-k-l-e-y.

DIRECT EXAMINATION

BY MR. GLYNN:

Q. Mr. Buckley, are you presently in custody of the Ventura County Sheriff's Department?

A. Yes.

Q. What are you in custody for?

A. Um, first degree murder, burglary and robbery.

Q. Did you plead guilty to the murder of Thomas Urell?

A. Yes.

Q. When did you do that?

A. December 17th.

Q. December 17th?

A. That's when I signed the paper.

Q. Okay. When did you actually come into court and plead guilty?

A. Last Monday.

Q. Now, was that as part of an agreement with the District Attorney's office?

A. Yes.

Q. What is your understanding as to what the District Attorney's office will do?

A. Drop the robbery and burglary and make it second degree.

Q. When will that be done?

A. After I testify truthfully.

Q. Will that take place at sentencing?

A. Yes.

Q. What is your understanding as to the difference between first degree murder and second degree murder?

A. The penalty?

Q. Yes

A. 15 years to life.

Q. For what?

A. For second degree.

Q. And what is it for first degree?

A. 25 years to life.

Q. What are you expected to do in return for the D.A.'s office in reducing the murder to second degree?

A. Just to testify truthfully.

Q. I'm showing you what is entitled a Felony Disposition Statement, and attached to that is a letter dated to Willard Wiksell. December 15th, 1987.

Have you seen this Felony Disposition Statement?

A. Yes.

Q. And did you sign that document December 17th?

A. Yes, I did.

Q. And did you also sign the back of this letter that's been dated December 15th?

A. Yes.

Q. Did you sign that on the same day?

A. Yes.

Q. Does this letter contain the agreement between you and the District Attorney's office?

A. Yes.

(Conclusion of requested proceedings.)

(Proceedings subsequent to this point are not transcribed herein.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

COURTROOM 34
HON. CHARLES R. McGRATH, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	
vs.	)	No. CR 23005
BRIAN A. BUCKLEY,	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, March 1, 1987

APPEARANCES:

For the People: MICHAEL D. BRADBURY
District Attorney
BY: DONALD C. GLYNN
Deputy District Attorney
800 South Victoria Avenue
Ventura, California 93009

For Defendant: WILLARD WIKSELL
Conflict Defense Associates
800 South Victoria Avenue
Room 302
Ventura, California 93009

ROSSANA K. GARCIA, CSR 6303
Official Reporter Pro Tempore
300 South Victoria Avenue
Ventura, Califor[illegible]. 93009

VENTURA, CALIFORNIA, TUESDAY,
MARCH 1, 1988, 1:20 PM
---o0o---

THE BAILIFF: Remain seated, come to order.

THE COURT: This is the matter of the People versus Brian Buckley. The case is here for probation and sentence hearing. The Court has received, read and considered the probation officer's report and recommendation to the Court and the report is now ordered filed.

It would be my intention to follow the recommendation. That's just an indication to counsel and is subject to change if counsel changes my mind during the argument or evidence.

MR. GLYNN: Your Honor, before beginning the People would move the Court to declare Count 1 to be murder in the second degree.

THE COURT: Motion is granted.

MR. GLYNN: Also move the Court to dismiss Counts 2 and 3 and to dismiss the two special allegations, all as part of the negotiated disposition.

THE COURT: Motion is granted.

MR. GLYNN: And I would state on the record that Mr. Buckley has complied with the terms of the negotiated disposition. He has been a cooperative witness in all of the phases of the Fauber trial and he has testified at the preliminary hearing in the case against Christopher Caldwell.

THE COURT: All right. Thank you.

MR. WIKSELL: Your Honor, there is really two matters that I wish to address. The first one is I would like to strike a section or a line on Page 26, Number 9; and that being that the probation officer has indicated that the Defendant has expressed no remorse for the loss of the victim's life.

I think that is contrary to, not only Mr. Buckley's statements, but his conduct as well in cooperating with the police at the earliest time, and as well as his testimony. And he certainly has expressed remorse repeatedly and I would request that be stricken.

THE COURT: All right. Any response to that motion?

MR. GLYNN: The People don't object.

THE COURT: The motion is granted. Number 9 appearing on Line 19, approximately, on Page 26 of the report is stricken.

MR. WIKSELL: Thank you.

Secondly, your Honor, in my view the Court will sentence Brian Buckley to the term prescribed by law, but there is tremendous concern by Mr. Buckley for his safety. He has at the very outset requested protection either by out-of-state placement or protective custody because of his testimony, not only against Mr. Fauber, but Mr. Caldwell as well.

We referred this and I requested the Court to ask probation to look into the suitability of an out-of-state placement and they've done that and they have addressed that in the probation report, as we know, and they said basically that's up to the Department of Corrections.

I will request, however, that specifically for whatever weight is given that the Court either attach in a sentencing sheet or a Minute Order of some kind that the Court specifically find that Brian Buckley should be given consideration for his testimony, and that he should be placed in protective custody immediately upon a review by the Department of Corrections, and if possible out-of-state placement to the Pacific Northwest should be considered.

He has gone beyond the call normally of somebody who has aided the police. And certainly the prosecution, I believe, agrees with that. And I think it's important to note that there is still a pending homicide in which Brian Buckley figures prominently as a witness, and he fully intends to cooperate as well.

So with that in mind, I would just ask the Court to do whatever it can to ensure Mr. Buckley's safety. And if the Court

can ask that out-of-state placement be followed, we would request that.

And with that I would submit it, your Honor.

THE COURT: All right, Thank you. The People wish to be heard?

MR. GLYNN: Your Honor, I agree with Counsel's comments regarding the out-of-state placement if that's possible. And I believe we did talk to you at one time about that and you felt that it was within the Rules to do something like that, that you certainly were in favor of it, too. So I guess we're all in agreement that if it can be done, we'd like to see it done.

THE COURT: All right.

The Defendant waive formal arraignment for judgment?

MR. WIKSELL: Yes.

THE COURT: Any legal cause why judgment should not be pronounced?

MR. WIKSELL: No.

THE COURT: The Court notes that the Defendant is technically eligible for a grant of probation if the Court were to find this to be an unusual case in which the interests of justice would be served by such a grant. The Court does not so find. The Court's intention is to sentence the Defendant to the term prescribed by law.

In addition to the Court's determination that this is not an unusual case, the Court finds that there is some indication that if the Defendant's not imprisoned, he would be a danger to the person of others.

The Court notes the Defendant entered the victim's house and stood by as the co-defendant killed the victim in this case.

Further, the nature and seriousness and circumstances of this crime indicate that the defendants originally entered the victim's house with the co-defendant with an intent to steal, specifically to steal cocaine.

The victim was bludgeoned to death by the co-defendant while this co-defendant stood by -- this defendant stood by. The Defendant and the co-defendant then stole the victim's car and

an antique safe.

The circumstances that the defense indicate that the victim was extremely vulnerable in that he had his hands taped behind his back and was laying face down on the bed at the time he was bludgeoned to death.

And the Court further notes that the Defendant used a 22 caliber pistol at the time of the commission of the offense.

And the Court further notes that the record indicates planning and staking out of the house and preparation such as the accumulation of hats, masks, and gloves between the Defendant and the co-defendant.

And finally, the Defendant appears to the Court to be in danger, if not already, addicted to cocaine. And also it appears that he has a problem of abusing alcohol.

For all of these reasons, the Court finds this is not an interest of justice case and denies the application for probation.

The Court does impose the term prescribed by law as 15 years to life. The Defendant is granted presentence credits by the Court of 110 days actual time, 55 days good time-work time, a total of 165 days.

The Defendant is ordered to pay a restitution fine of $10,000 to the State Restitution Fund. The Court finds and the Court requests that the clerk show on the Abstract and the Minutes that the Defendant's life is in danger in prison because of the testimony that he gave against his co-defendant in this case, and because of expected testimony in another murder case; and that the Court requests that the Department of Corrections give the Defendant protective custody status in state prison and seriously consider him as a candidate for out-of-state placement.

Mr. Buckley, you have a right to appeal from your conviction which occurred when you entered your plea -- before plea on January 4th. And you have a right to appeal from the sentence I have imposed today.

If you wish to appeal, sir, you must file a written Notice of Appeal and file it with this Court no later than 60 days from today and state any grounds that you have in the notice.

If you appeal, you have the right to have an attorney represent you in the appeal and to have the Court prepare a transcript of all proceedings in which you appeared in this case.

If you cannot afford to retain an attorney or pay for a transcript, both of those things will be provided for you at no cost to you if you ask the Court for it.

Do you understand all of that?

THE DEFENDANT: Yes.

THE COURT: All right. You are subject to parole terms and conditions if and when you are paroled by the Department of Corrections. This specific offense carries a parole term for the rest of your natural life once you would be released from the state prison facility.

If you should violate a term or condition of parole, you would be placed back into prison for up to one year for any single violation.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: The Defendant is remanded to the custody of the sheriff then for transportation to the Department of Corrections pursuant to the Court's sentence.

MR. WIKSELL: CDA was appointed, there is no ability to repay.

THE COURT: The Court finds specifically no ability.

Thank you.

MR. GLYNN: Thank you, your Honor.

MR. WIKSELL: Your Honor, Mr. Buckley's mother has got four photographs and she wishes that she could give them to Mr. Buckley.

THE COURT: All right, fine. The bailiff will transmit them to the transportation officers.

(Proceedings concluded.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

COURTROOM 46

HON. ROBERT C. BRADLEY, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	
vs.	)	No. CR 21927
CURTIS LYNN FAUBER,	)	
Defendant.	)	

REPORTERS' TRANSCRIPT ON APPEAL
February 5 and 9, 1988

APPEARANCES:

For the People: MICHAEL D. BRADBURY
District Attorney
BY: DONALD C. GLYNN
Deputy District Attorney
800 South Victoria Avenue
Ventura, California 93009

For Defendant: JAMES MATTHEW FARLEY
Attorney at Law
800 South Mills Road
Ventura, California 93003

THOMAS F. GRAHAM, CSR 2935
SUSAN E. RIZZARDI, CSR 3928
Official Reporters
800 South Victoria Avenue
Ventura, California 93009

Q. By not think so, does that mean you can't recall?

A. I don't remember. We could have got some liquor, but I don't remember.

Q. Mr. Buckley, you expect to be released from prison someday, don't you?

A. Yes.

Q. When do you think that's going to occur?

MR. GLYNN: Objection. This isn't relevant.

THE COURT: Overruled.

THE WITNESS: Seven and a half years.

BY MR. FARLEY:

Q. Seven and a half years.

A. Yes.

Q. You told us here that Mr. Fauber used some words to you that this gentleman, this man was hard to kill; is that correct?

A. Yes.

Q. Do you remember the hearing we had here out of the presence of the jury that you were asked a question by Mr. Glynn: "Mr. Buckley, can you tell us what Chris Caldwell said.

"Answer: No, he told me, um, something like he was saying how hard he was to kill. I can't really remember anything else right now."

Do you remember testifying to that in this court?

A. I think so.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

COURTROOM 35
HON. CHARLES R. McGRATH, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	
vs.	)	No. CR 21927
BRIAN A. BUCKLEY,	)	
Defendant.	)	

REPORTERS' TRANSCRIPT OF PROCEEDINGS
January 4, 1988

APPEARANCES:

For the People: MICHAEL D. BRADBURY, ESQ.
District Attorney
BY: DONALD C. GLYNN, ESQ.
Deputy District Attorney
800 South Victoria Avenue
Ventura, California 93009

For the Defendant: WILLARD P. WIKSELL, ESQ.
Attorney at Law

MARTIN Y. HECKERMAN, CSR 1151
Official Reporter
800 South Victoria Avenue
Ventura, California 93009
(805) 654-2212

VENTURA, CALIFORNIA; MONDAY,
JANUARY 4, 1988; A.M.
---o0o---

THE COURT: Good morning.

MR. SIMON: Call No. 25 on the court's calendar Brian Buckley.

MR. GLYNN: Good morning, your Honor, Don Glynn for the People.

MR. WIKSELL: Good morning, your Honor, Willard Wiksell for Mr. Buckley, he's present in custody.

THE COURT: Yes.

MR. GLYNN: That case is on for arraignment and also for a plea.

THE COURT: All right. You can proceed with the -- well, I guess we better appoint counsel.

MR. WIKSELL: I have already been appointed. This was on last week and we continued it for arraignment until now.

THE COURT: Okay, fine. Go ahead with the waivers and I'll be looking --

MR. GLYNN: The Information has been filed but it has not been served on Mr. Buckley.

EXAMINATION

BY MR. GLYNN:

Q Is your name Brian A. Buckley?

A Yes.

MR. GLYNN: May the record reflect that I am handing a copy of the Information CR 23005 to the defendant.

THE COURT: Yes.

MR. WIKSELL: Your Honor, we'll waive further reading of the Information, recitation of rights, enter pleas of -- in a moment we're going to enter a plea of guilty to Count 1, but we're going to deny Counts 2 and 3 and the Special Allegations; and as to the guilty plea it's going to be as to a second degree homicide.

So we're ready to proceed now with a plea as to Count 1, stipulated that it's going to be second degree.

THE COURT: All right. Well, then the Court needn't be concerned about the other counts.

MR. GLYNN: That's not entirely correct. We will make a motion that the Court declare the murder to be second degree at the time of sentencing.

THE COURT: All right.

MR. GLYNN: Is that --

MR. WIKSELL: Well --

MR. GLYNN: -- your understanding, counsel?

MR. WIKSELL: My understanding is that we have an agreement that this -- that Count 1 will be declared to be a second degree murder at the time of sentencing and it's conditioned upon him testifying truthfully in a case as outlined in a letter which will be attached to the formal plea agreement. Obviously subject to those conditions we would expect this to be declared a second degree murder.

THE COURT: And at the time of sentencing then the People are going to move to dismiss the remaining two counts and to strike the Special Allegations?

MR. GLYNN: That's correct, your Honor.

THE COURT: Okay, fine, I understand, Go ahead.

EXAMINATION

BY MR. GLYNN:

Q All right, Mr. Buckley, I understand that today you're going to plead guilty to Count I of the Information C923005; is that correct?

A Yes.

Q I'm going to read the count for you.

"The District Attorney of the County of Ventura accuses Brian Buckley of the crime of violation of section 187 of the Penal Code in that on or about July 16, 1986 in the County of Ventura, State of California, that you did wilfully, unlawfully and with malice aforethought murder Thomas Urell, a human

being."

Do you understand the charge in Count 1?

A Yes.

Q Now, I have here a Felony Disposition Statement that I'm going to go over with you. There are several other charges on the information that will be dismissed at the time of sentencing; do you understand that?

A Yes.

Q And do you also understand that the murder will be declared by the Court to be second degree murder at the time of sentencing?

A Yes.

Q And this is contingent upon certain things that you will have to do in turn. But let me get into the waiver of your rights.

Are you entering into this plea voluntarily and not as the result of any pressure, force, threats or coercion brought against you or members of your family?

A Yes.

Q And have any commitments been made to you other than those shown in this Felony Disposition form and also in this letter dated December 15th that will be made a part of the Felony Disposition form?

A Yes.

Q No, I think you misunderstood my question. Do these two forms, the letter dated December 15th and the Felony Disposition form, this yellow form that you have signed --

A Yeah.

Q -- do these two forms contain all of the promises that have been made to you in this case?

A Yes.

Q Have you discussed the facts of the case with your attorney and discussed all the possible defenses that you might have to this case?

A Yes.

Q Now before a plea can be accepted the Court has to consider a document for proof of the factual basis of your plea. Do you agree that the Court can consider the preliminary

hearing transcript to make that determination?

A Yes.

Q And has your attorney explained all of the consequences of your plea to this charge?

A Yes.

Q Do you understand that for second degree murder you could be sentenced to state prison for a maximum possible term of 15 years?

A Yes.

Q And do you understand that after serving a prison term you'll be subject to a parole period --

I'm sorry, your Honor, does the Court know the parole period for second degree murder? I didn't enter that in the document.

THE COURT: Yes, it's -- the possibility is parole for life.

Q (BY MR. GLYNN:) All right, I've entered this into the document. You could be subject to a parole period of life. And you could also be ordered to pay a fine of not less than a hundred dollars nor more than $10,000. Do you understand that?

A Yes.

Q Before we can accept your plea there are certain constitutional rights that you have to waive. You have the right to have every charge and allegation against you determined by a jury of 12 people. You have the right to confront and through your attorney cross-examine each witness called by the prosecution to prove your guilt. You have the right to be represented at all times during trial by a competent attorney and to have the Court appoint one to represent you at no charge if you cannot afford one.

You have the right against self-incrimination which means you would not have to testify at your trial and if you did not testify the jury could not consider that as evidence of guilt. Do you understand each of those four rights that I have just read to you?

A Yes.

Q Do you waive each of those rights?

A Yes.

Q Now as I stated before and it's also contained in this Felony Disposition form, that at the time of sentencing the people will ask the Court to declare the murder to be murder in the second degree with a maximum term of 15 years to life. And the People's reason for entering into that agreement are contained in this document that's attached to the Felony Disposition Statement.

I'd like to go into the terms of this agreement with you. In order -- or as your part of the agreement you will agree to cooperate in the trials against Curtis Fauber and Christopher Cogwell, and that you will testify in the Fauber case at all proceedings regarding the murder of Thomas Urell, David Church and Jack Dowdy, and testify truthfully regarding whatever you know about those murders. Do you understand that to be the situation?

A Yes.

Q And do you agree that you will testify truthfully and cooperate in those proceedings?

A Yes.

Q And you also agree to testify against Curtis -- I'm sorry, against Christopher Cogwell regarding the murder of David Church, and that would be both in trial and in a preliminary hearing. Do you understand that to be the case?

A Yes.

Q And it's -- as part of your agreement you must agree to testify truthfully as to any of the facts in those cases. Is that your understanding?

A Yes.

Q And if there is any dispute at the end of these proceedings regarding your truthfulness that will be determined by the judge who hears these proceedings, by the trial judge; do you understand that?

A Yes.

Q At the end of the case against Curtis Fauber and at the end of the preliminary hearing against Christopher Cogwell you'll be sentenced at that time and the People will move that

the Court declare the murder to be second degree and you'll be sentenced accordingly; do you understand that?

A Yes.

Q But at the same token if it is determined that you have not testified truthfully and have not cooperated then we'll be back to square zero and you will be allowed to withdraw your plea and nothing that you have told us in these negotiations will be used against you in a trial. Do you understand that?

A Yes.

Q I'm showing you the Felony Disposition form, this yellow form here, that has some initials B.B. against a number of the paragraphs. Also has the initials D.C.G. which are my initials against some of the paragraphs. And at the end of the form I see the date December 17, 1987 and your signature. Did you sign this document on that date?

A Yes.

Q And did you sign this document because you read each of the paragraphs that you have initialed and you understand what's contained in these paragraphs?

A Yes.

Q And I'm showing you this letter dated December 15th written to Willard P. Wiksell, and at the end it contains my signature and the signature of Willard Wiksell and your signature. Is that your signature at the end of this document?

A Yes.

Q And have you signed that because you understand all of the terms of this agreement regarding your plea to murder and your testifying in the cases against Christopher Cogwell and Curtis Fauber?

A Yes.

MR. GLYNN: Your Honor, I would ask that the Court file the Felony Disposition Statement and attached to it the letter to Willard Wiksell dated December 15th and make the appropriate findings.

THE COURT: All right. Mr. Buckley, having in mind your rights now and the possible punishment that could result from your plea tell me what your plea is to Count 1 of the charge of

murder?

THE DEFENDANT: Guilty.

THE COURT: Mr. Wiksell, do you join in the waivers and plea.

MR. WIKSELL: Yes.

THE COURT: I have indicated on page 4 of the Felony Disposition Statement form that the Court is making no pre-plea commitments to the defendant in this case and has signed the form now on page 6. And the form is now ordered filed along with the letter from the office of the district attorney to Mr. Wiksell.

In connection with these proceedings this morning, Mr. Buckley, the Court finds as follows: I find that you are represented by capable and experienced counsel; I find that you understand your constitutional rights, the nature of your plea and the maximum consequences possible of your plea; I find that you freely and voluntarily enter your plea and that you have been advised of and knowingly and intelligently waive and give up your rights against self-incrimination, to be tried by a judge or a jury and to confront and cross-examine the witnesses against you. I have reviewed the transcript of the preliminary hearing in this case and based on that find that there is a factual basis for your plea and order your plea of guilty entered to Count 1.

The Court now vacates any pending trial date and refers you and your case to the probation office for presentence investigation and report.

MR. WIKSELL: Your Honor, in connection with that there are two things. One, we're going to waive time for sentencing, and I don't know if we have a date, but secondly, there has been an inquiry made by my client to the district attorney's office that he be allowed to serve his prison sentence in a federal prison. And I think it procedurally would be best to note that on the application of probation so they can make whatever inquiry is necessary to expedite the situation so that when he is sentenced ultimately he can go directly into the federal system. And I would like to note that if it's at all possible he would request

the Pacific Northwest and specifically Oregon if there is a federal prison in that state. Probation thus would be alerted if there is those possibilities.

THE COURT: I knew that there was a consideration of out of state commitment here which I believe I indicated to the people, a telephone conversation, that was agreeable with the Court, doesn't matter to me particularly where Mr. Buckley serves his sentence. I didn't realize that it was everybody's idea to put the onus on the probation office to arrange that.

MR. WIKSELL: Well, I think it just -- number one, we're going to have several months. We're looking probably about a March trial date -- or sentencing date rather. And I don't know who else would be able to do it. Unless it would be the people to make those arrangements. Because I've never done it. I've never called up a federal bureau of prisons and said: I'd like my client to do it out of state. I think they'd just hang up on me.

THE COURT: Okay. Well, we'll try it and see what happens.

MR. WIKSELL: Okay.

THE COURT: What -- did you have a date for probation and sentence in mind?

MR. WIKSELL: Well why don't we just have a target date of like the early part of March and then after the preliminary hearing in Cogwell I would advance it for sentencing.

THE COURT: All right.

MR. WIKSELL: And he does waiver time.

You understand you have a right to have -- normally you would have a right to have your sentencing done within 28 days. Do you understand that?

THE DEFENDANT: Yes.

MR. WIKSELL: And you are agreeable to waive your right to a speedy sentencing until after the preliminary hearing of Chris Cogwell?

THE DEFENDANT: Yes.

MR. GLYNN: Excuse me, counsel. Cogwell's preliminary hearing has been set for I think it's January 14. So that will actually take place before the end of Curtis Fauber's trial, so

probably be the end of February.

MR. WIKSELL: Well, right. So I was thinking --

MR. GLYNN: Completion of whatever of those is less.

MR. WIKSELL: Right.

THE COURT: Okay.

MR. GLYNN: Perhaps, your Honor, set it for March 1st, and if we complete all of the hearings before that date then I'll alert counsel and we can just advance it.

THE COURT: Okay. I'm leaving this department the end of January. If you gentlemen like and the defendant requests, I'll keep the case for sentencing, or you can keep the case here and Judge Jones can do this. But whatever you want to do is fine with me.

MR. WIKSELL: Why don't you -- normally wouldn't make any difference because it's a second degree murder and you can only sentence him to 15 to life. But given the little wrinkle of the federal prison and the conversations that have gone by, I would prefer that the case remain with you, your Honor.

THE COURT: That's fine. Okay we'll set the probation and sentence hearing now for March 1st. And Mr. Buckley that is beyond the 28 day time limit in which you have a right to be sentenced. Do you understand that right and for at least today's purposes waive your right to be sentenced until March 1st?

THE DEFENDANT: Yes.

THE COURT: Okay. The Court orders the probation department to prepare a probation and sentence report then and to include in the report the -- and investigate the possibility of a sentence in the federal system, federal correctional system and preferably in the Northwest or the state of Oregon.

MR. WIKSELL: Thank you, your Honor.

THE COURT: And the case will be set for probation and sentence hearing March 1st a Tuesday at 8:30 in courtroom 34.

MR. WIKSELL: Thank you.

MR. GLYNN: Thank you, your Honor.

THE COURT: You're welcome.

FILED
JAN 4 1988

MICHAEL D. BRADBURY
District Attorney
800 South Victoria Avenue
Ventura, CA 93009

Telephone (805) 654-2501

Attorney for Plaintiff

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	COURT NO. CR-23005
vs.	**FELONY DISPOSITION STATEMENT**
BRIAN A. BUCKLEY, Defendant.	

I.

PLEA

A. CHANGE OF PLEA

The defendant will plead GUILTY (x) NOLO CONTENDERE ( ) to:
CNT 1 - 187 PC (MURDER)
____ and admit _____.
The remaining counts will be dismissed after the defendant

is sentenced.

OTHER CASE DISPOSITIONS: _____

_____

B. SUMMARY OF DISTRICT ATTORNEY'S REASON FOR DISMISSAL OR AMENDMENT
(Deputy District Attorney to initial)

__ The defendant is entering (a plea to the most serious charge, giving) (pleas to sufficient counts to give) the court adequate discretion to impose an appropriate sentence.

/s/ The defendant cannot be (convicted) (sentenced) on the count because it arises from the same facts as the count(s) to which the defendant has pleaded.

___ _____
_____
_____
___

C. NOLO CONTENDERE PLEA (Defendant to initial, if applicable)

___ I understand that for all purposes, my plea of nolo contendere (no contest) has the same effect as a guilty plea, constitutes a conviction, and empowers the Court to sentence me as though I had pleaded guilty. It also may be used against me as an admission in a civil proceeding.

D. VOLUNTARINESS OF PLEA (Defendant to initial)

/s/ I have discussed the facts of the case and all possible defenses which I might have with my attorney.

/s/ I am entering this plea freely and voluntarily and not as

the result of any force, pressure, threats or coercion brought against me or any member of my family; further, no commitments have been made to me or my attorney other than those appearing on this form.

E. FACTUAL BASIS FOR PLEA (Defendant to initial)

/s/ I agree that the Court may consider the following as proof of the factual basis for my plea:

[x] Preliminary hearing transcript

[ ] Police reports

[ ] Probation report

[ ] Welfare investigator's declaration

[ ] _____

F. CONSEQUENCES OF PLEA (Defendant to initial)

/s/ My attorney has explained to me the direct and indirect consequences of this plea including the maximum possible sentence. I understand that the following consequences could result from my plea:

/s/ I could be sentenced to the state prison for a maximum possible term of 15 year(s).

___ I could be sentenced to the California Youth Authority for a maximum possible term of ____ year(s).

___ I will be required to register as a sexual offender pursuant to Penal Code § 290.

___ I could be deported, excluded from or denied

naturalization if I am not a citizen. (Penal Code § 1016.5.)

___ My driver's license will be suspended or revoked for a period of _____ (§§ 13350, 13352 of the Vehicle Code).

___ I will not be granted probation, and execution or imposition of sentence will not be suspended (1203.055(c), 1203.06, 1203.65, 1203.66, 1203.07, 12-3.075, 1203.08, 1203.085, 1203.09 PC).

___ I will not be granted probation unless the court finds that this is an unusual case where the interests of justice would best be served by granting probation (462, 462.5, 1203(e), 1203.04 PC).

/s/ After I have served my prison term, I may be subject to a maximum parol period of life (In re Carabes, 144 Cal. App. 3d 927).

___ I will be required to register as a narcotics offender.

/s/ I will be ordered to pay a fine of not less than $100 nor more than $10,000 (Gov't Code § 13967).

___ _____

_____

—

G. WAIVER OF CONSTITUTIONAL RIGHTS (Defendant to initial)

My attorney has explained to me, and I understand, that this plea will result in my conviction and that I am therefore waiving (giving up) each of the following constitutional rights:

/s/ 1. The right to have every charge and allegation against me determined by a jury of 12 persons;

/s/ 2. The right to confront and, through my attorney, cross-examine each witness called by the prosecution to prove my guilt;

/s/ 3. The right to be represented at all times during a trial by a competent attorney and to have the Court appoint one to represent me at no charge, if I cannot afford one;

/s/ 4. The right against self-incrimination which means I would not have to testify at my trial and if I did not, the jury could not consider this as evidence of guilt.

II.

A. DISTRICT ATTORNEY

THE DISTRICT ATTORNEY'S POSITION ON SENTENCE (Deputy District Attorney to initial)

___ Any authorized sentence may be sought.

___ The defendant should be placed on probation and not now be sentenced to state prison. The defendant may, however, at a later time be sentenced to state prison if a court finds he has violated a term or condition of his/her probation.

___ The defendant will receive credit for time served.

/s/ At the time of sentencing the People will move the court to declare the murder to be murder in the second degree, with a maximum term of 15 years to life.

SUMMARY OF DISTRICT ATTORNEY'S REASON FOR SENTENCE: (Deputy District Attorney to initial)

___ The defendant has no prior criminal record.

___ The severity and frequency of the defendant's prior criminal record is not serious.

___ The underlying facts of the case are not sufficiently serious to require a state prison sentence at this time.

/s/ The reasons for the People's agreement, and the terms of the agreement to move the court to declare the murder to be murder in the second degree are set forth in the attached letter & are incorporated by reference in this felony disposition statement.

B. THE COURT

/s/ The court makes no commitments; any authorized sentence may be imposed.

The Court, in this non-Proposition 8 case, over the objection of the District Attorney, makes the following statements concerning sentencing: (Judge to initial)

___ The defendant will be placed on probation and not now be sentenced to state prison. If, however, he later violates his probation, he may be sent to prison at that time.

___ _____

-

C. HARVEY WAIVER (Defendant to Initial)

___ The defendant agrees that all facts and information

relating to any and all counts, allegations of prior conviction, and other sentencing enhancement allegations which are dismissed by the Court as part of this disposition may be included in the probation report and considered by the Court in determining sentence.

III.
DEFENDANT'S AND DEFENSE ATTORNEY'S POSITION

I have read, discussed with my attorney, and understand the consequences of this plea and waive (give up) the above-mentioned constitutional rights. I request that the Court accept my new plea.

DATED: Dec. 17, 1987
/s/ _____

(Defendant's signature)

I have explained to the defendant all of his constitutional rights. I am satisfied he understands them and also understands that by entering this plea he is giving up each of them. I have discussed the facts of the case and all possible defenses to the charges with the defendant. I have explained the direct and indirect consequences of this plea to the defendant and am satisfied he understands them. I am satisfied the defendant is voluntarily and of his own free will seeking to enter this plea. I request the Court to accept this plea.

DATED: Jan. 4, 1988
/s/ _____

(Defendant's Attorney's Signature)

IV.

DISTRICT ATTORNEY'S STATEMENT

With the exception of any commitments made to the defendant by the Court, the District Attorney agrees to the terms of this disposition and requests that the Court accept it and order this statement filed.

MICHAEL D. BRADBURY, District Attorney
County of Ventura, State of California

DATED: 1-4-88
By /s/

Deputy District Attorney

FINDINGS AND ORDER

The Court finds that:

1. Defendant and his attorney appeared in open court and the defendant entered his plea(s) and admission(s).

2. Defendant understands the nature of the charge(s) and the consequences of his plea(s) and admission(s).

3. Defendant has knowingly, intelligently, and understandingly waived his rights as set forth above.

4. Defendant's waivers of his rights, and his plea(s) and admission(s), are free and voluntary.

5. There is a factual basis for the plea.

IT IS ORDERED THAT:

1. Defendant's plea(s) and admission(s) are accepted.

2. The clerk file this document and incorporate it in the minutes of this case.

DATED: 1-4-88

/s/

Judge of the Superior Court

The defendant's plea is accepted conditionally, pursuant to Penal Code section 1192.5, and I have advised the defendant that my approval of this plea is not binding, that at the probation and sentencing hearing I may withdraw my approval, and that if I do so, he may withdraw his plea if he desires to do so.

DATED: _____

_____

Judge of the Superior Court

REV. 5/86

OFFICE OF THE DISTRICT ATTORNEY
County of Ventura, State of California

MICHAEL D. BRADBURY
District Attorney

COLLEEN TOY WHITE
Assistant District Attorney
VINCENT J. O'NEILL, Jr.
Chief Deputy District Attorney
BRADEN McKINLEY
Chief Investigator

December 15, 1987

Willard P. Wiksell
674 County Square Dr., Suite 301
Ventura, CA 93003

Re: People v. Brian A. Buckley
Case No.: FE35171, CR-

Dear Mr. Wiksell:

This letter is to memorialize the District Attorney's position on the above-numbered case against your client, Brian A. Buckley. It is based on our recent conversation regarding a possible agreement.

1. Mr. Buckley is charged in the above-entitled complaint as follows:

Count I - Murder of Thomas C. Urell on July 16, 1986, in violation of section 187 PC.

Count 2 - Robbery of Thomas C. Urell on July 16, 1986, in violation of section 211 PC.

Count 3 - Burglary of the residence of Thomas C. Urell on July 16, 1986, in violation of section 459 PC. within the

meaning of sections 460.1, 465(2), and 667 PC.

2. The District Attorney's Office offers to move the court to declare the murder to be murder in the second degree. In turn, Mr. Buckley must testify truthfully as a witness against Curtis L. Fauber regarding Fauber's participation in and all other facts known to Mr. Buckley regarding the murders of Thomas A. Urell, David W. Church, and Jack D. Dowdy, Jr., and testify truthfully as a witness in any proceeding concerning Christopher A. Caldwell regarding Caldwell's participation in and all the other facts known to Mr. Buckley regarding the murder of David W. Church.

3. Before any agreement can be reached, Mr. Buckley must submit to a preliminary interview by members of the District Attorney's Office to assess his credibility. In the event that the District Attorney's Office decides that Mr. Buckley is not telling the truth, then no agreement will be reached, and the above-entitled case will proceed to trial. Any statements by Mr. Buckley during this preliminary interview, of course, will not be used against him in a subsequent trial.

   In the event that the District Attorney's Office decides that Mr. Buckley is telling the truth, the District Attorney's Office will enter into an agreement with itemized terms four through seven, as set out below.

4. Mr. Buckley will plead guilty to Count 1, in the above-entitled information. He will waive time for sentencing, and his sentencing will be continued until the completion of both the trial of Curtis L. Fauber and the preliminary hearing for Christopher A. Caldwell.

5. Mr. Buckley will make himself available, and will testify truthfully in any proceedings in the prosecution against Curtis L. Fauber for his participation in the murders of

Thomas C. Urell, David W. Church, and Jack D. Dowdy, Jr., and in any proceedings in the prosecution against Christopher A. Caldwell for his participation in the murder of David W. Church. In the event of a dispute, the truthfulness of Mr. Buckley's testimony will be determined by the trial judges who preside over these hearings.

6. Following the conclusion of the trial against Curtis L. Fauber, and the preliminary hearing against Christopher A. Caldwell, Mr. Buckley will be sentenced on case number CR-23005. If Mr. Buckley has complied with the terms of this agreement, as fully as possible as of that date, the District Attorney's Office will move the court to declare the murder to be murder in the second degree, and Mr. Buckley will be sentenced on that charge. At that time, the remaining counts will be dismissed. Mr. Buckley will remain obligated to testify in the remaining proceedings as specified above.

7. If, however, Mr. Buckley has not complied with the terms of this agreement, the District Attorney's Office will not be bound to move the court to declare the murder to be murder in the second degree, nor will the District Attorney's Office be bound to dismiss the other two counts. At that time, Mr. Buckley will be allowed to withdraw his plea, and case number CR-23005 will proceed to trial. As stated in item five, the trial judges who hear Mr. Buckley's testimony in the various proceedings will make and necessary findings as to his truthfulness.

This offer expires at the close of the Peoples' case in the trial against Curtis L. Fauber (approximately January 8, 1988).

Very truly yours,

/s/

DONALD C. GLYNN
Senior Deputy District Attorney

I AGREE TO THE TERMS SET FORTH ABOVE.

/s/ Jan - 4- 1988
Willard P. Wiksell
Attorney for Defendant

/s/ Dec. 17, 1987
Brian A. Buckley
Defendant

DCG:ed

FILED
DEC 17 1987

VENTURA COUNTY MUNICIPAL COURT
STATE OF CALIFORNIA
HALL OF JUSTICE Department

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, vs. BRIAN A. BUCKLEY, DEFENDANT WVSD	No. FE35171 **CR23005** COMPLAINT ☒ FELONY ☐ MISDEMEANOR (Sect. 17b P.C.)

COUNT 1

James D. Ellison, being first duly sworn, says that BRIAN A. BUCKLEY committed the crime of violation of section 187 of the Penal Code a (felony), (xxxxxx), in that on or about July 16, 1986, in Ventura County, California, he did willfully, unlawfully, and with malice aforethought murder Thomas Urell, a human being.

FELONY MURDER ALLEGATION NO. 1

It is further alleged that the murder of Thomas Urell was committed by the defendant, BRIAN A. BUCKLEY, while the defendant was engaged in the commission and attempted commission of the crime of robbery in violation of Penal Code Section 211, within the meaning of Penal Code Section 190.2(a)(17).

FELONY MURDER ALLEGATION NO. 2

It is further alleged that the murder of Thomas Urell was committed by the defendant, BRIAN A. BUCKLEY, while the defendant was engaged in the commission and attempted commission of the crime of burglary in the first and second degree in violation of Penal Code Section 460, within the meaning of Penal Code Section 190.2(a)(17).

COUNT 2

Said complainant further accuses BRIAN A. BUCKLEY of committing the crime of violation of section 211 of the Penal Code, a felony, in that on or about July 16, 1986, in Ventura County, California, he did willfully, unlawfully, and by means of force and fear take personal property from the person, possession, and immediate presence of Thomas Urell.

COUNT 3

Said complainant further accuses BRIAN A. BUCKLEY of committing the crime of violation of section 459 of the Penal Code, a felony, in that on or about July 16, 1986, in Ventura County, California, he did willfully and unlawfully enter the residence and inhabited dwelling house occupied by Thomas Urell, with the intent to commit larceny within the meaning of Penal Code sections 460.1, 462(a) and 667.

All recommended by
District Attorney
DCG:kv
_____ /s/_____

for Apr. 11/12/87, 1:30 p.m., D-12
Officer _____
Location from _____ 197__
_____ 197__

Subscribed and sworn to before me this 12th day of November, 19 87.

/s/
Deputy District Attorney, Ventura County

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LA2003FA0003

(3)

No. 05-1623

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. TILTON, Acting Secretary of the California Department of Corrections and Rehabilitation, *Petitioner*

v.

BRIAN A. BUCKLEY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(619) 235-0508
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No. 05-1623

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. TILTON, Acting Secretary of the California Department of Corrections and Rehabilitation, *Petitioner*,

v.

BRIAN A. BUCKLEY, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brian Buckley, Respondent, opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Respondent adopts the statement of the Opinions Below as presented by Petitioner.

JURISDICTION

Respondent adopts the statement of Jurisdiction presented by Petitioner. Respondent's Opposition, following the obtaining of extensions of time, is timely.

RELEVANT STATUTORY PROVISIONS

Respondent adopts the statement of relevant statutory provisions submitted by Petitioner.

CUSTODY/BAIL STATUS

Appellee has been released from the Department of Corrections since January 13, 2003. An application for a stay of the Order granting the Habeas Corpus was made by Respondent to the United States District Court and denied after it was shown, amongst other factors, that Appellee had been a model prisoner for over fifteen years and *even the D.A. who had prosecuted him believed that he was suitable for parole*.

Appellee is currently living in Ventura County. He has maintained two jobs, obtained a drivers license, obtained an apartment, and has been evaluated by his parole officer as "exemplary" in her performance on parole.

A second application for a stay of the Order granting the Habeas Corpus was made by Respondent to this court on February 10, 2003. After extensive response by Appellee, including two addendums establishing his performance during his release, Appellant's motion to stay the judgment pending appeal was denied on March 13, 2003.

STATEMENT OF THE CASE

The Crime

There is no dispute that Brian Buckley and Curtis Fauber engaged in a robbery of a drug dealer, Thomas Urell. However, it is also without dispute that Mr. Buckley did NOT actively or passively participate in either the assault or the killing of the victim. In fact, it was absolutely clear that Fauber, and Fauber alone, suddenly and independently and without warning to or concurrence of Mr. Buckley, killed the victim without *any* participation by Mr. Buckley. This clear difference in conduct between the parties played a key part in the plea bargain which was later offered to Mr. Buckley; a plea bargain which is the foundation of this Petition.

The State Court Proceedings

Sometime after the killing, the Respondent was arrested for traffic violations and, at the direction of the Deputy District Attorney, Donald Glynn, questioned about the murder, without *Miranda* warnings. He was even promised that his statements could not be used against him. (D-4)[1]

---

[1] Unless otherwise stated, Respondent's references are those from Petitioner's Appendix to the Petition for Writ of Certioari.

Relying on those assurances, Respondent gave a full statement incriminating not only Curtis Fauber, but another man, Christopher Caldwell, for another murder. The Respondent thereafter resolved his traffic tickets and released and co-defendant Fauber was arrested and charged with murder. The police used Respondent's statement to obtain a confession from Fauber. They proceeded in a capital case against Fauber, but their case fell apart in the middle of trial when Fauber's confession was declared inadmissable. (D-4).

On November 12, 1987, over a year after his initial statement, the government charged the Respondent with "Felony Murder", primarily to obtain his testimony against Fauber. The Respondent's testimony was crucial to Fauber's prosecution and the District Attorney's office had already invested a great deal of resources in obtaining a conviction against Fauber.

Prior to his indictment, Respondent had no criminal history - other than the traffic tickets mentioned above.

On December 17, 1987, Respondent was shown two documents detailing an offer by the prosecution to Respondent to settle his case. (This

was still early in the criminal proceedings; very shortly after the Preliminary Examination.)

The first document was a letter from Ventura County Deputy District Attorney Donald Glynn, the D.A. who's case against Fauber was falling apart. The letter, addressed to Respondent's counsel, offered to move to reduce his charge from first to second degree murder if Respondent testified truthfully as a witness against Caldwell and Fauber. (D-5; O-1).

The letter itself did not discuss sentence, however concurrent with the letter, Respondent was presented with a form prepared by the District Attorney entitled "FELONY DISPOSITION STATEMENT" which delineated the terms of Respondent's plea bargain (N-1). The form contains multiple paragraphs stating different terms and obligations, each with a small typed line on the left hand side of the paragraph for initials. (*Id.*)

Under the category "F. Consequences of Plea (Defendant to initial)" a typed paragraph reads: "I could be sentenced to the state prison for a maximum possible term of __ year(s)." **The District Attorney had written "15" into the blank space**. The Respondent initialed this paragraph. (*Id.*)

A separate paragraph about halfway down the page reads: "After I have served my prison term, I may be subject to a maximum parole period of ___." (*Id.* at p.39.) The District Attorney had written "life" into the blank space. The petitioner initialed this paragraph. (*Id.*)

Respondent was initially hesitant to enter into the plea bargain because he feared violent retaliation by Fauber, Caldwell, and/or other prison inmates if they found out he had cooperated with the prosecution.

Respondent's counsel told him that it was likely he would not even have to serve the maximum of fifteen years, but would probably be released after as few as seven and a half years in custody.

On December 17, 1987, Respondent signed both the letter and the Felony Disposition Form[2].

---

[2] **D.A. INVESTIGATOR TROXEL'S TESTIMONY (obtained at the federal evidentiary hearing:**
On December 21, 1987, Larry Troxel, a District Attorney's investigator for over ten years as of that time, who was assigned to the investigation against Fauber and who had arrested Respondent on the traffic tickets and interviewed him a year earlier, re-interviewed Respondent. (The order confirming that an Evidentiary Hearing was held on July 31, 2002 is found at E-1. A partial transcript of testimony of the Federal Evidentiary Hearing [hereinafter ERT] is filed herein. See ERT 14-15, 70-71). During the interview, or perhaps during another meeting where Mr. Glynn and Respondent were present, the plea bargain offered by the prosecution was discussed. Based upon those discussion, Mr. Troxel believed that

On January 4, 1988, Respondent pled guilty to one count of second degree murder. (Exhibit M)[3] When the Respondent changed his plea to guilty the Felony Disposition Form and the letter containing the District Attorney's plea offer were attached and entered into evidence as the plea agreement. (M-4 and M-7).

Respondent would plead guilty to second degree murder and would receive a sentence of "15 years, tops", so long as he testified truthfully against Fauber. ERT 16. His understanding was that Respondent would not be required to serve "any time beyond 15 years." ERT16.

In fact, there was discussion that petitioner would probably "do less than the 15 years, perhaps half that time. ART 16-17. It was not Mr. Troxel's understanding that petitioner's sentence would be 15 years to life in jail. ERT17.

Mr. Troxel conveyed his understanding of Respondent's sentence to Respondent's mother, Jynx Schoaf. ERT 24. Mr. Troxel made it clear that his understanding of Respondent's sentence bargain was based on discussions with Mr. Glynn. ERT 20, 24.

Mr. Glynn had no doubt as to Mr. Troxel's integrity and believability. ERT 211.

[3] **ADVICE ON THE DAY OF THE PLEA**

On the day of the change of plea, prior to going to court, Petitioner met with his counsel, Mr. Troxel, and Mr. Glynn in the holding cell outside of the courtroom. ERT 72-73. The four men discussed whether or not petitioner should plead guilty. Petitioner was reluctant because he feared violent retaliation. ERT 57-58, 73-74. At that time, Petitioner was told either by his trial counsel or Mr. Glynn that he should focus on the "7 ½ years he would serve" if he accepted the plea; that he could get a degree in prison and start his own business after he was released; he would still be a young man. ERT 73-74.

During the change of plea proceeding the prosecutor reiterated what Respondent had agreed to when he signed the change of plea form when the prosecutor asked the Respondent whether he understood he could be "sentenced to state prison for **a maximum possible term of 15 years**." (M-5, emphasis added). He then asked if Respondent knew he would be "subject to a parole period of life." Respondent said "Yes." (*Id.*)

Soon afterwards the prosecutor said "*as I stated before and it's also contained in this Felony Disposition form*, that at the time of sentencing the people will ask the Court to declare the murder to be murder in the second degree with a maximum term of 15 years to life." (M-6).

It is impossible to observe from the Exhibits presented by Respondent to this Court - though the *handwritten* original of the document proves that during the change of plea hearing (which was eighteen days after the Respondent had signed the agreement) the prosecutor added certain handwritten portions to the agreement, initialed these additions, and signed the bottom of the amended agreement. One of the handwritten comments stated that "the People will move the court to declare the murder to be murder in the second degree with a maximum term of 15 years to life." (The miscreant language is at the very bottom of N-5.

The original shows that this language was added on the day of the hearing and NEVER shown to the Respondent. *Respondent did not know of or agree to this additional language.*

Respondent believed that the two statements, "maximum of fifteen years in prison" and "fifteen years to life," were synonymous as the prosecutor had prefaced the statement by stating he was only repeating what he had just said and what was in the disposition form.

Respondent attorney did not note any difference between the prosecutor's two statements or object.

The court did not modify the prosecutor's language or make any corrections or additions to the prosecutor's statements.

After the prosecutor had concluded his examination of Respondent the court asked for his plea. The Respondent pled guilty. (*Id.*)

Respondent performed his part of the plea bargain in every respect. First, he pled guilty to the charge, relinquishing his constitutional rights, including his right to a jury trial, to confront the evidence against him, and to require the State to prove the case against him beyond a reasonable doubt.

Thereafter, he ran the risk of retaliation and physical harm (a risk which the trial court took seriously and testified three times for the

prosecution: at the guilt-phase of Fauber's trial, at Caldwell's preliminary examination, and at the penalty-phase of Fauber's trial.

On January 7, 1988, Respondent testified on behalf of the prosecution in the guilt trial of Curtis Fauber. (Exhibit J). Respondent was cross-examined by Fauber's defense attorney and asked what the penalty for second degree murder was. He responded "15 years to life." (J-5).

On January 22, 1988, Respondent testified at Christopher Caldwell's preliminary hearing on the prosecution's behalf. The issue of his sentence was not raised.

On February 9, 1988, Respondent testified at the penalty phase of Curtis Fauber's trial. (Exhibit L) On cross-examination, Mr. Fauber's attorney sought to impeach petitioner by showing that Respondent had received a "sweet deal" in exchange for his testimony against Mr. Fauber:

Q: Mr. Buckley, you expect to be released from prison someday, don't you.

A: Yes.

Q: When do you think that's going to occur?

MR. GLYNN: Objection. This isn't relevant.

THE COURT: Overruled.

THE WITNESS: Seven and half years.

BY MR. FARLEY (FAUBER'S COUNSEL):

Q: Seven and a half years.

A: Yes

(Exhibit L-2).

Respondent's answer was made under oath just a month after he entered his plea of guilty. It reflected his understanding that he would receive a maximum sentence of 15 years in custody, pursuant to which - so long as he stayed out of trouble and worked in prison - he would be released in half of the fifteen years.

Mr. Glynn, who heard the Respondent testify, never made any attempt to clarify, explain or discuss petitioner's understanding about his sentence. [4]

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[4] At the federal evidentiary hearing, Mr. Glynn indicated that he was probably surprised by the testimony, but stated he was too busy with other activities to "correct" the Petitioner. ERT 215:11.

On March 1, 1988, (Exhibit K),[5] Respondent was sentenced on his case. The District Attorney advised the court that Petitioner had "complied with the terms of the negotiated disposition" and "has been a cooperative witness in all of the phases of the Fauber trial and he has testified at the preliminary hearing in the case against Christopher Caldwell." (K-2) (Both Fauber and Caldwell were ultimately convicted.)

Based upon the advice he received from his counsel, the statements he initialed in the Felony Disposition Form, the statements made by Mr. Glynn on the record regarding his sentence, and Mr. Glynn's failure to correct Respondent when he explained his understanding of his sentence while under oath at the Fauber trial, Respondent actually believed he would only be serving a maximum of fifteen years in custody, followed by a term of parole for life - a conclusion even the District Attorney felt was reasonable.[6]

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[5] Exhibit K's cover sheet is mis-dated. The parties have agreed that there was a typographical error made and that the correct date is "March 1, 1988" It is also mis-labeled in Petitioner's "Index to Appendix", when it is referred to has a Transcript of a "Plea" proceeding. It is actually a Transcript of a "Sentencing" proceeding.

[6] Even the District Attorney acknowledged, while under oath, that standing alone, the part of the Felony Disposition statement which stated that "I

Following his sentencing, Respondent continued to be concerned with his safety. The sentencing court found that "the Defendant's life [was] in danger in prison because of the testimony that he gave against his co-defendant in this case, and because of expected testimony in another murder case." (K-5). The court requested that the Department of Corrections give Respondent protective custody and "seriously consider" him for out-of-state transfer. (K-5)[7]

In 1995, Petitioner first became aware that the commitment of a maximum of 15 years in custody might not be met. At his initial

---

understand that I could be sentenced to the state prison for a maximum possible term of 15 years" reasonably could be understood as a determinate sentence of 15 years maximum. ERT 157-158, 198-199.

[7] While in prison, Respondent was a model prisoner. He remained disciplinary free, with no incidents of violence during his incarceration, attending hundreds of hours of Alcoholics and Narcotics Anonymous. His prison psychiatric evaluations have opined that "he should be no significant danger to the community at large," and that "his violence potential is estimated to be no more than average relative to the average citizen in the community."

Before the United States District Court, the United States Court of Appeal panel and the *en banc* United States Court of Appeal, even the District Attorney and the Attorney General acknowledged that Respondent is suitable for release.

documentation hearing in 1995, Petitioner learned that the plea bargain agreement which he had signed setting out a term of a maximum of fifteen years imprisonment with a parole period of life would not be honored; instead Petitioner's sentence was fifteen years to life and Petitioner was finally informed what that meant.

The Federal Habeas Corpus Proceedings

Respondent adopts the statement of Petitioner in it's Petitioner regarding the Federal Habeas proceedings AND supplements it with the matters to which it has previously referred.

REASONS FOR DENYING THE PETITION

Certiorari should be denied because the Ninth Circuit opinion did not conflict with the court decision in *Ricketts v. Adamson*, 483 U.S. 1 (1987) and *Estelle v. McGuire*, 502 U.S. 62 (1991).

I. THE NINTH CIRCUIT DECISION WAS CORRECT WHEN IT DETERMINED THAT, "UNDER CLEARLY ESTABLISHED FEDERAL LAW", RESPONDENT HAS A DUE PROCESS RIGHT TO ENFORCE THE TERMS OF HIS PLEA AGREEMENT AND THAT THE CALIFORNIA COURTS WERE WRONG WHEN THEY FAILED TO EVALUATE HIS PLEA BARGAIN UNDER CONTRACT LAW, *AS REQUIRED BY CALIFORNIA LAW.*

The Ninth Circuit opinion in this case did not break new ground or over step the limitations of the AEDPA. It's decision was nothing more

than an enforcement of this Court's interpretation of the constitutional Due Process guarantee that a criminal defendant has a right to enforce the terms of his plea bargain.

Petitioner may state its argument in any manner it wishes, or cast aspersions on the Ninth Circuit's decision, but the analysis and decision in this case is very straightforward.

The Ninth Circuit held that under *Santobello v. New York*, 404 U.S. 257, 261-62 (1971) a criminal defendant has a due process right to enforcement the terms of his plea agreement. Petitioner concedes this point.

The Ninth Circuit then stated that *Ricketts v. Adamson*, 483 U.S. 1, 6 n.3 (1987) establishes that the interpretation of state court plea agreements is a matter of state law. Simply put, this means that the California courts are obligated to interpret Mr. Buckley's plea agreement under it's own law.

The Ninth Circuit went on to say that in California, negotiated plea agreements are a form of a contract and it is interpreted according to general contract principles, *People v. Shelton* 37 Cal4th 759, 767 [2006] and "according to the same rules as other contracts" *People v. Toscano*, 124 Cal. App.4th 340, 344 (2004) (citing other cases in California back to 1982).

Petitioner mis-interprets the Ninth Circuit decision. Petitioner states that the Ninth Circuit decision held that the U.S. constitution, as interpreted by this court, has held that "a state must apply contract law principles to interpret plea bargains". (Petition page 11) It did no such thing. It never once stated that federal law required that all state courts must interpret state plea bargains under contract law. It only stated that in California, the California courts have established that plea bargains must be interpreted by contract law and that the U.S. constitution guarantee of due process, as applied to the states in the 14th Amendment, requires that if California says it must interpret plea bargains under contract law, then Mr. Buckley had a right to expect that the California courts would do so in his case.

In essence, the Ninth Circuit said that California could, "within reason" interpret plea bargains under any standard it wanted, but when California decides that its laws require that California plea bargains be interpreted by California contract law, Mr. Buckley had a federal right to expect that California would abide by it's own law in interpreting his plea bargain. See *Hicks v. Oklahoma*, 447 U.S. 343 (1980), a defendant's "liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State."

Petitioner argues that the Ninth Circuit substituted its view on the process used by the California courts in interpreting Mr. Buckley's plea bargain. (Petition, page 11). But this is mistaken. The Ninth Circuit only required that California follow it's own laws, and when a California court interprets a plea bargain *without any consideration of contract law, which is required in California, as happened in this case*, then this Respondent's federal due process rights are being denied to him.

Petitioner never disputes the Ninth Circuit's conclusion that the holdings of *Shelton and Toscano* establish that California requires its plea bargains to be interpreted under contract law.

Petitioner never disputes the Ninth Circuit's conclusion that the Superior Court in Mr. Buckley's case NEVER applied contract law to the interpretation of his plea bargain.

Yet despite that, Petitioner argues that even though the Superior Court ignored all evaluation of contract law, and focused only on it's conclusion as to the state of mind of Mr. Buckley at the time he entered his plea, the state court did it's job.

Petitioner can assert this all it wants, but it's own argument concedes that the California courts didn't interpret Mr. Buckley's plea bargain as it's

own law requires it to do, and that this failure acted as a violation of Mr. Buckley's federal constitutional guarantees.

Petitioner attempts to muddy the water by referring to other type of foundational requirements of plea bargains under federal law. It refers to a number of cases which establish federal foundational requirements to a plea bargain (i.e., that the plea be knowing and voluntary). Respondent doesn't dispute that these requirements are part of any plea bargain, but what Petitioner fails to acknowledge, but what the Ninth Circuit clearly held, is that the *interpretation* of whether California plea bargains meet these requirements must be made under the process that California has, itself, established. Since California requires that it's plea bargains must be interpreted under California contract law, then Mr. Buckley had a federal right to expect that California courts would do so. When they entirely ignored it's own requirement, then the Ninth Circuit stated it had the right to interpret California law.

Petitioner says that this is a violation of *Estelle v. McGuire*, 502 U.S. at 68. It is not. The *Estelle* case found that where the state court addressed the question of the propriety of admitting a certain type of evidence under

state law and concluded it was admissible, it was improper for a federal court to replace that conclusion with it's own interpretation of state law.

That is NOT what happened in this case. Here the California court completely ignored the California law it was required to consider. When the California court reviewed Mr. Buckley's plea bargain, it completely ignored California's contract law, as it was required to do.

This case is more akin to *Hicks v. Oklahoma*, where the state court was found to have deprived a defendant of his state rights without consideration of the rights whatsoever.

In this court, the Ninth Circuit cautiously looked to the last reasoned state decision to see if it did, in accordance with California law, interpret the plea bargain as a contract and apply the three-step approach to interpreting contracts required by California law.

The Ninth Circuit properly found (A-11) that the Superior court made no mention of or reference to state contract law. The Ninth Circuit properly noted that the Superior Court also never discussed any of the terms of the plea agreement. Instead, it found, that the Superior Court addressed only whether Mr. Buckley was "expressly advised" and cites California cases dealing with "advisment".

But this is NOT an "advisement" issue. It is a contract issue, and this is not as a result of a finding of law of the Ninth Circuit, but a requirement under Californ[illegible] own laws.

The Ninth Circuit thereafter determined that the superior court failed to construe the terms of the plea agreement entirely.

Thereafter, the Ninth Circuit further cautiously proceeded to determine if it should take any action even in the face of the clear failure of the Superior Court to interpret it's own law. The Ninth Circuit (A-13), strictly adhering to the requirements of AEDPA, refused to take any action remediating the Superior Court error unless it could be established that there was prejudice from their error.

The Ninth Circuit thereafter made a cautious and painstaking evaluation of whether or not Mr. Buckley was prejudiced by the Superior Court's failure to consider contract law. It carefully looked at California's own three step contract requirement, as established *by California law*, (A-14).

California law requires that an interpretation of a contract begin by considering the written contract itself. In this case, where the written contract at one point states that the plea bargain calls for a determinate

sentence of 15 years followed by a life on parole, and at another point calls for a sentence of "15 to life", it properly concluded that the written contract was ambigious.

Under California law, when the written contract is ambiguous, the second step of contract analysis requires an evaluation of the language surrounding the written contract. Here, the language surrounding the contract is equally ambiguous. The words completely mirror the written contract.

Under California law, when the both the written contract and the words around them are ambiguous, it is required that the contract be interpreted against the person who created the contract, which in this case, is without dispute, the District Attorney.

As such the Ninth Circuit properly found that an interpretation of this plea bargain under California contract law would lead to an approval of Mr. Buckley's claim, and that therefore he suffered prejudice as a result of the Superior court's failure to follow it's own laws.

There is NOTHING ground breaking about this interpretation. It is NOT as the Petitioner asserts the Ninth Circuit's replacement of it's opinoin

over the opinion of the state court because the Superior Court never evaluated this plea bargain under it's own laws.

The Ninth Circuit thereafter found, that as a result of this error, undisputed federal law requires that the contract be "specifically enforced" and Petitioner concedes this conclusion.

Concluding Remarks

The law is supposed to be above political leanings. When a man's life hangs in the balance, the liberal or conservative bent of judge or a justice or a Circuit or a Supreme Court is not supposed to control what a federal statute says or how the Constitution is interpreted.

And there is shame on a prosecuting agency when it represents it's state government and it panders to the perceived political leanings of this Court by emphasizing the perceived political leanings of the 9th Circuit:

> "[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . ."
>
> *Berger v. United States*, 295 U.S. 78 (1935)

When the Petitioner in this case - the Attorney General, the prosecuting representative of sovereignty of the state of California - urges

this Supreme Court to render a ruling by saying ". . . that the Ninth Circuit has *once again* lost sign of the most elementary constraints on federal habeas corpus power . . . " it is doing nothing more than attempting to waive a "red flag of the Ninth Circuit's historical liberalism" before the perceived conservativism of this Court.

The Petitioner's smugness is particularly unfair, when it knows it is arguing for the incarceration of a person who it knows, deserves to be out of custody and it knows it has turned it's back on a method offered to it to allow this single person, this small man - Brian Buckley - to live his days in freedom instead of in a cement block behind barbed wire and electrified fences.

The Petitioner's unfairness manifests in two primary ways. First, because it repeatedly chooses to ignore the fact that Mr. Buckley set in motion this litigation almost ten years ago to gain his freedom and everyone, even the D.A. who prosecuted him completely believes he has earned his freedom - that he should be paroled, that seventeen years in prison was sufficient; that he is suitable for release.

At the conclusion of every oral argument in this case, the Attorney General has acknowledged that the prosecutor in the case and the

investigator for the prosecutor in the case acknowledge that Brian has earned the right to be released. A federal magistrate judge, a federal district judge, and seventeen judges of the 9th Circuit court of appeal, all have basically conceded that he should be out.

The parole agents who have supervised Brian Buckley in the five years since he's been released from prison and have called him a model parolee (I think their quote was, "Brian, if all my parolees were like you, I'd be out of a job") all agree he should be out.

The Attorney General itself has conceded that all the parties concur that Mr. Buckley should be out of jail, but it argues that he shouldn't be released "this way" (meaning through a Petition for a Writ of Habeas Corpus) but rather should gain his release through the Parole Board. Yet astoundingly, when the 9th Circuit offered the Attorney General to mediate this case - in effect, saying, forget the legal issues for the time being, let's get the parties together in our mediation unit and reach a fair decision for this one individual, this very same Attorney General stood up and objected. It argued it shouldn't be made to mediate the case.

Petitioner's unfairness almost manifests in the way it argues we should ignore the real facts surrounding the contract between the Petitioner

and Respondent in this case and all of the facts regarding the California Superior Court decision in this case. The Petitioner knows all to well that when the Superior Court judge made it's decision it did not have before it information the defendant, when fulfilling his bargain and testifying as a witness for the prosecution against two murderers, he believed his plea bargain called for a determinate sentence. It is so ironic that the D.A. who needed Mr. Buckley's help to prosecute two other defendants, who put Mr. Buckley at risk for his life by assisting the prosecution, NEVER once attempted to dis-abuse Mr. Buckley that he was (purportedly) under the wrong impression, i.e., that there is no such thing as a "15 year determinate term" in California, and that he was going to go to jail for 15 to life. His only excuse for failing to tell his star witness that he was risking his life for a promise that the D.A. could not keep was that he "was too busy" to tell him.

The Petitioner also knows that at the time the Superior Court judge was evaluating Mr. Buckley's state habeas petition, he did not have before him the knowledge that the D.A.'s own investigator, having heard the very same discussion of the issue as the defendant, also believed that the plea bargain called for the defendant to receive a 15 year determinate term.

Perhaps most dis-ingenuously, the Petitioner argues that the federal courts shouldn't be able to consider this evidence, because it only came to light during a federal evidentiary hearing, but it also knows that if the Superior Court judge didn't know this information, Petitioner *itself* did, yet chose to *withold* this information from the Superior Court judge *at the time of the hearing in the Superior Court.*

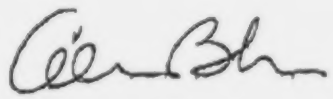
One can only wonder of the Petitioner was again "too busy" to tell the Superior Court judge the full and true facts of the case.

CONCLUSION

For the reasons stated above, Petitioner respectfully urges this Court to deny the Petition.

DATED: March 1, 2007

RESPECTFULLY SUBMITTED,



ALLEN BLOOM
ATTORNEY AT LAW

(2)

No. 05-1623

Supreme Court, U.S.
FILED
MAR 15 2007
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

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v.

BRIAN A. BUCKLEY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEITIONER'S REPLY MEMORANDUM

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QUESTIONS PRESENTED

Finding as a fact that the prisoner "well knew" his plea bargain called for a sentence of fifteen years to life imprisonment, the state court rejected his claim that the bargain called only for a maximum sentence of fifteen years instead. Without disturbing the state court's factual finding, the Ninth Circuit Court of Appeals ordered habeas corpus relief on grounds that California contract law required the state court to ignore the prisoner's actual understanding of the bargain.

The Questions Presented are:

1. Did "clearly established federal law" require the California court to apply state contract law to the plea bargain claim?

2. If so, may the federal court order habeas corpus relief based on its own view that state contract law required the state court to ignore the prisoner's understanding of the bargain?

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No. 05-1623

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. TILTON, Secretary of the California Department of Corrections and Rehabilitation, *Petitioner*,

v.

BRIAN A. BUCKLEY, *Respondent.*

PETITIONER'S REPLY MEMORANDUM

1. The clearly established federal law governing plea agreements, for the purposes of federal habeas corpus review under 28 U.S.C. 2254(d)(1), is that due process requires a defendant to enter his plea in a "knowing," "voluntary and intelligent manner." See *Brady* v. *United States*, 397 U.S. 742, 748 (1970); see also *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984); *Santobello* v. *New York*, 404 U.S. 257, 261 (1971). Although a defendant has a right to enforce a promise made to him as part of his plea agreement when that agreement is breached, this Court has never articulated a specific method for evaluating whether a breach of a plea agreement has occurred. *Santobello* v. *New York*, 404 U.S. at 257-67; see *Smith* v. *Stegall*, 385 F.3d 993, 999 (6th Cir. 2004); *Innes* v. *Dalsheim*, 864 F.3d 974, 978 (2nd Cir. 1988). In fact, this Court has held that a federal court sitting in habeas jurisdiction must proceed "without second guessing [a state's] finding of a breach" and is without "license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation."

Ricketts v. *Adamson*, 483 U.S. 1, 5 n.3 (1987). This Court has also repeatedly held that a federal habeas court may not grant a prisoner relief on the basis of a perceived state law error. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

In the instant case, the en banc panel of the Ninth Circuit ignored the controlling, clearly established federal law governing plea agreements, and violated the command of *Estelle v. McGuire* by holding that the state courts had a duty under the federal Constitution to determine whether respondent's plea agreement complied with California contract law. Pet. For Cert. A9-A10. The Ninth Circuit then substituted, in direct contravention of this Court's precedent, "a federal interpretation of the terms of a plea agreement for a reasonable state interpretation." *Ricketts* v. *Adamson*, 483 U.S. at 5 n.3. The Ninth Circuit did so without ever concluding that respondent did not enter his plea in a voluntary, knowing, or intelligent manner. Pet. for Cert. A1-A17.

In his Opposition, respondent contends that the Ninth Circuit's holding in the instant case was entirely proper and his analysis simply echoes that of the Ninth Circuit's opinion. He reiterates the Ninth Circuit's errors and declines to come to grips with the Questions Presented. Opp. 14-18. His argument reduces itself to the assertion that the California courts violated the federal Constitution by failing to follow their own process for evaluating a claim of a breach of the plea agreement. Yet he fails to identify any clearly established federal law which required the state court to confine its review of his claim to abstract considerations of the paper record as if it were construing a commercial contract. On the contrary, the state courts were entitled, and in fact required, to determine what respondent understood his plea agreement to mean in order to assess whether he entered the plea in a knowing and voluntary manner. *Brady* v. *United States*, 397 U.S. at 748; *Mabry* v. *Johnson*, 467 U.S. at 509; *Santobello* v. *New York*, 404 U.S. at 261.

In this case, the state superior court concluded that

respondent "well knew" that his plea agreement required an indeterminate term of fifteen years to life. Pet. for Cert. H1-H3. The Ninth Circuit erred in substituting a review of the process used by the state court for a review of the result reached in the state court, and the Ninth Circuit's conclusion that the reasonableness of the state court's determination regarding respondent's state of mind "is wholly irrelevant" is indefensible in light of the existing precedent of this Court. Pet. for Cert. A12. Nothing in this Court's opinion in *Ricketts*, or in any other case of this Court, supports the Ninth Circuit's conclusion in the instant case that as a matter of "clearly established federal law" under section 2254(d)(1), a state court must construe a plea agreement according to a particular set of state-law principles identified by the federal court. And no case before this one has held that a federal court may reinterpret a state court's reasonable construction of a plea agreement to determine whether a breach has occurred, rather than confining itself to the relevant constitutional determination of whether a plea was entered in a knowing, voluntary, and intelligent manner.

Respondent's defense of the Ninth Circuit opinion relies on a single case, *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), to assert that California created a liberty interest in the process by which it evaluates plea agreements. Opp. at 16, 19. *Hicks* is entirely inapposite. In *Hicks*, this Court held a state law guaranteeing a criminal defendant certain procedural rights at a sentencing hearing, even if not constitutionally required, may give rise to a liberty interest protected from arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment. *Hicks*, 447 U.S. at 346. The constitutional requirements controlling plea agreements, unlike the procedural rights at issue in *Hicks*, were already clearly established matters of federal law, and governed by the requirement that such agreements must be entered in a knowing, voluntary, and intelligent manner. This is the standard adhered to by the state superior court in this case, but it is a standard that the en banc panel of the Ninth Circuit

wholly ignored. Pet. for Cert. A2-A17, H1-H3. Moreover, respondent never alleged a *Hicks* violation in the California Supreme Court, in the district court, or in the Ninth Circuit, and the Ninth Circuit did not rely upon *Hicks* in any manner in its Opinion. (Pet. for Cert. at A1-A17.) Thus, not only is respondent's reference to *Hicks* misguided, but the application of *Hicks* to respondent's claim would render the claim unexhausted. 28 U.S.C. § 2254(b); *Picard* v. *Connor*, 404 U.S. 270, 275 (1971).

2. Even assuming that *Ricketts* permits a federal court to conduct a review of a state court's determination of breach for reasonableness, the state courts' rejection of respondent's claim was eminently reasonable and that determination was entitled to deference. The Ninth Circuit did "not explain the nature of the deference it purport[ed] to afford the state courts, and one is unable to detect any such deference in the approach" taken by the Ninth Circuit. *Ricketts* v. *Adamson*, 483 U.S. at 5 n.3.

Respondent filed a state habeas petition in the Ventura County Superior Court, through counsel, alleging *both* that he had been misadvised during the plea hearing and that he understood his plea agreement to require that he serve no more than a determinate term of fifteen years in state prison. The Superior Court reviewed the petition filed by respondent and his supporting exhibits: the felony complaint, the prosecutor's offer letter, the felony disposition form, and the reporter's transcripts of respondent's plea and sentencing hearings. Pet. for Cert. H1-P3.[1/] The superior court ordered the district attorney to file a

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1. Respondent correctly notes that the original cover sheet of the reporter's transcript of his sentencing proceeding in state court erroneously provides that the hearing occurred on March 1, 1987, rather than on the correct date, March 1, 1998. Opp. 12 n5. Petitioner reproduced the cover sheet with the erroneous date in the Appendix to the Petition for Certiorari. Pet. for Cert. K1. Petitioner's Index to the Appendix also mislabeled this exhibit as a transcript of the plea proceedings rather than the transcript of the sentencing proceedings.

return. The district attorney's return included a declaration of the prosecutor, Donald Glynn, denying that the People had ever offered respondent anything other than an indeterminate term of fifteen years to life under the plea agreement. Moreover, the prosecutor attached respondent's testimony given during the guilt phase of the Fauber trial, three days after the entrance of the plea, in which respondent testified that he understood his plea agreement to require a term of "15 years to life." Pet. for Cert. J1-J6. The superior court then directed respondent to file a traverse, and told respondent that it was specifically concerned with his testimony during the guilt phase of the Fauber trial. Pet. for Cert. I1. Respondent filed a traverse, but presented no additional evidence in superior court and did not address the superior court's concern regarding his testimony during the Fauber hearing. The superior court denied habeas relief in a written opinion, finding that "the advisement was that the sentence would be 15 years to life as provided by law, and that the [respondent] well knew this." Pet. for Cert. H1-H3, I1, J1-J6. Importantly, in denying relief the superior court cited to *In re Moser*, a case that specifically discusses the "distinction between a mere misadvisement with regard to the consequences of a guilty plea and a violation of a plea agreement." *In re Moser*, 6 Cal.4th 342, 354-355, 24 Cal. 4th 2d 723 (1993).

Respondent errs in suggesting that the superior court did not apply California's own contract law to his claim. Opp. 17-18. Assuming a state law contract analysis was required by clearly established federal law, the superior court had no duty to expressly state that it was engaging in a contract analysis to comply with 28 U.S.C. § 2254(d)(1). *See Early* v. *Packer*, 537 U.S. 3, 8 (2002) (a state court need not provide a "formulary statement" on a particular issue where "the fair import" of its holding its evident from its opinion); *see also Bell* v. *Cone*, 543 U.S. 447, 455 (2005). Nevertheless, the state superior court's citation to *In re Moser* demonstrates that it applied the relevant state law governing violations of plea agreement to respondent's case. Pet. for Cert. H3. Moreover, the superior court's analysis

itself demonstrates that it applied the relevant state law to respondent's case. The superior court looked to the competing provisions regarding respondent's sentence contained in the felony disposition statement and in the reporter's transcript of the plea proceedings, then turned to the extrinsic evidence of respondent's testimony during the guilt phase of the Fauber trial, in which respondent testified that he understood his plea agreement to require a term of fifteen years to life, to resolve the existing ambiguity. The superior court's act of looking to extrinsic evidence to resolve an ambiguity in the agreement was entirely proper and reasonable under California state law, as respondent's subsequent conduct in testifying that he understood his plea agreement to require a prison term of fifteen years to life helped resolve any ambiguity attending to the agreement. See *People* v. *Shelton*, 37 Cal. 4th 759, 767, 37 Cal. Rptr. 3d 354 (2006); *Morey* v. *Vannucci*, 64 Cal. App. 4th 904, 912, 75 Cal. Rptr. 573 (1998). Respondent does not dispute than an ambiguity existed, but he simply omits, as did the Ninth Circuit, the provision of California law providing that a court must look to extrinsic evidence of subsequent conduct to resolve an ambiguous provision of a plea agreement or contract. Opp. 19-21. On this basis, too, it cannot be said that the state superior court's rejection of respondent's claim regarding his plea agreement was contrary to, or constituted an objectively unreasonable application of, clearly established federal law. 28 § 2254(d)(1).

3. Respondent asserts that his testimony during cross-examination of the penalty phase of the Fauber trial, in which he responded to a question regarding when he expected to be released or paroled from prison by stating, "seven and a half years," "reflected his understanding that he would receive a maximum sentence of 15 years in custody," and he further complains that the prosecutor, Mr. Glynn, had a duty to disabuse him of this belief. Opp. 11, 25; see Pet. for Cert. L2. However, respondent's expectation that he would be paroled in

seven and a half years was consistent with a reasonable understanding of parole eligibility for second degree murder, and the required indeterminate term of fifteen years to life, under California law at the time of respondent's sentence. *In re Oluwa*, 207 Cal.App.3d 439, 255 Cal.Rptr. 35 (1989). *Oluwa*, decided one year *after* respondent was sentenced, clarified that a defendant sentenced to an indeterminate term of fifteen years to life for second degree murder would be eligible for parole after ten, rather than seven and one-half, years of custody. *Id.* at 442-47. Prior to *Oluwa*, there was great confusion under state law with respect to whether a defendant sentenced to an indeterminate term of fifteen years to life for second degree murder would be eligible for parole after of seven and a half, or ten, years. *Id.* at 443; see *In re Jovan B.*, 6 Cal.4th 801, 816 n. 10, 25 Cal.Rptr.2d 428 (1993) [discussing impact of *Oluwa*]. Because California law regarding the minimum parole eligibility of defendants convicted of second degree murder was in flux at the time of respondent's testimony at the Fauber trial and his subsequent sentencing hearing, it cannot be said that Mr. Glynn had any to duty to "disabuse" respondent of any particular belief regarding parole eligibility at the time. Opp. 11-12, 25; see Pet. for Cert. C21-C22.

4. Respondent appears to suggest that Petitioner had some duty to develop the factual record in state court on his behalf. Opp. 25-26. Any failure on Respondent's part to develop his own factual record in state court is solely attributable to respondent and his counsel at the time. Had respondent wished to present additional evidence to the superior court, he had every opportunity to do so as the superior court invited respondent to produce additional evidence prior to respondent's filing of the traverse. Pet. for Cert. 11. Respondent's failure to take the superior court up on its invitation demonstrates that he was content to rely on the state of the record before the superior court. See *Holland* v. *Jackson*, 542 U.S. 649, 652-653 (2000); *Williams* v. *Taylor*, 529 U.S. 420, 437 (2000).

5. Respondent relies extensively on evidence presented during the federal evidentiary hearing in arguing the propriety of the Ninth Circuit's judgment in this case and he has attached selected excerpts from that hearing to his Opposition. However, the district court erred in conducting an evidentiary hearing in this case as it never even attempted to determine the reasonableness of the state courts' findings "in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d)(2); *Miller-el* v. *Cockrell*, 537 U.S. 322, 340 (2003); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 9 (1992); see Pet. for Cert. C15-C19, D32-D33. Recognizing this fact, the en banc panel of the Ninth Circuit *did not rely* on the evidence presented during the federal evidentiary hearing in affirming the district court's grant of habeas relief to respondent. Pet. for Cert. A8-A9 ("We affirm, although our analysis differs from the district court's in some respects."). Instead, the Ninth Circuit focused solely on the evidence presented in state court, and concluded, based on this evidence alone, that respondent was entitled to relief. Pet. for Cert. A13 n.8. Thus, respondent's Opposition errs in focusing on evidence which was wholly irrelevant to the Ninth Circuit's conclusion that relief should be granted.

6. Respondent asserts that the "handwritten original" of the felony disposition form "proves that during the change of plea hearing . . . the prosecutor added certain handwritten portions to the agreement, initialed those additions, and signed the bottom of the amended agreement." Opp. at 8-9; see Pet. for Cert. N5 (last paragraph). Respondent further alleges that he was not shown the portion of the statement at issue prior to entering his plea. Opp. at 8-9. The original of the felony disposition form, which includes a portion written in the hand of the prosecutor, has never been introduced during any habeas corpus proceeding in state or federal court. Respondent appears to refer to a copy of the original, which has been presented to every level of the state and federal courts in these proceedings. Pet. for Cert. N5-N9. Although the district court made a factual

finding following the federal evidentiary hearing that certain language in the felony disposition statement was added to the document by the prosecutor after the document was signed by respondent, nothing in the document itself, whether the original or a copy, supports this allegation. Opp. 8-9; see Pet. for Cert. D7 n5. The reporter's transcript of the plea proceedings demonstrates that respondent was indeed shown the document prior to entering his plea. Pet. for Cert. M7. More importantly, the district court's finding on this issue, stemming from the improvidently granted federal evidentiary hearing, was not relied upon by the Ninth Circuit in granting habeas relief to respondent. Pet. for Cert. A13 n.8.

7. Respondent devotes a large portion of his Opposition to a section entitled "Concluding Remarks." Opp. 22-26. The remarks contained therein, and similar remarks appearing elsewhere throughout the Opposition, appear more relevant to an application for parole than to opposing the specific legal claims contained in the Petition for Writ of Certiorari. See Opp. 2, 13 n.7, 22-26. Respondent also sets forth a plethora of multiple-hearsay statements, attributing various extrajudicial statements not contained in the record to the attorneys, investigators, parole agents, and judges involved in these proceedings. Opp. 13 n. 7, 22-26. Respondent's concluding remarks constitute an attempt to garner sympathy by injecting into the case a host of irrelevant issues centering on his custodial status, which are unsupported by the record and not properly before this Court. *See Witters* v. *Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (a question presented must be decided on "facts as they appear in the record"); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) (matters outside of the record will not be considered). Respondent errs in asserting that "everyone . . . completely believes he has earned his freedom - that he should be paroled." Opp. 23. The California Board of Parole Hearings, the appropriate executive agency governing parole in the State of

California, has never had the opportunity to decide the propriety of respondent's release, and it is this agency which must "believe" that respondent "has earned his freedom" and that he "should be paroled." Opp. 23. Respondent's physical custodial status is not directly at issue in these proceedings, and the propriety of his continued release should be left to the California Board of Parole Hearings. Respondent's repeated references to unsubstantiated hearsay and matters outside the record of the instant case should be ignored.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: March 15, 2007

Respectfully submitted,

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